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Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1994

JACK WARD THOMAS, CHIEF,
UNITED STATES FOREST SERVICE, ET AL., PETITIONERS

v.

PACIFIC RIVERS COUNCIL, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Pursuant to Section 7(a)(2) of the Endangered Species Act of 1973, 16 U.S.C. 1536(a)(2), and implementing regulations, the United States Forest Service engages in consultation with the Fish and Wildlife Service and the National Marine Fisheries Service so as to insure that any action funded, authorized, or carried out by the Forest Service is not likely to jeopardize the continued existence of a threatened or endangered species. The Forest Service typically engages in consultation when it adopts, amends, or revises its Land and Resource Management Plans (LRMPs), and when it undertakes site-specific activities consistent with the plans. The questions presented in this case are as follows:

1. Whether the Forest Service is required in addition to reinitiate consultation on the LRMPs themselves upon the listing of a new threatened or endangered species.

2. Whether the court of appeals misapplied established equitable principles by directing the district court to enjoin, pending completion of the consultation process, site-specific activities that the Forest Service has determined are not likely to adversely affect the newly listed species.

PARTIES TO THE PROCEEDINGS

Jack Ward Thomas, in his official capacity as Chief of the United States Forest Service, and the United States Forest Service were appellees/cross-appellants in the court of appeals. Pacific Rivers Council, Oregon Natural Resources Council, Hells Canyon Preservation Council, The Wilderness Society, and Oregon Natural Desert Association were appellants/cross-appellees. Northwest Forest Resource Council, Ellingson Lumber Company, Intermountain Forest Industry Association, Wallowa County, and Robert Messinger were defendants-intervenors/appellees.

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59 Fed. Reg. (1994):
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Chief of the United States Forest Service and the Forest Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 30 F.3d 1050. The amended opinion of the district court (App., *infra*, 18a-44a) is reported at 854 F. Supp. 713. The district court's December 3, 1993, order (App., *infra*, 45a-47a) and its October 20, 1994, opinion on remand from the court of appeals (App., *infra*, 48a-60a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1994. A petition for rehearing was denied on September 22, 1994. App., *infra*, 65a-66a. On December 12, 1994, Justice O'Connor extended the time within which to file a petition for

a writ of certiorari to January 20, 1995. By order dated January 12, 1995, Justice O'Connor further extended the time for filing to and including February 3, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 6(a)-(f) of the Forest and Rangeland Renewable Resources Planning Act of 1974, 16 U.S.C. 1604(a)-(f); Section 7(a)(1), (a)(2) and (d) of the Endangered Species Act of 1973, 16 U.S.C. 1536(a)(1), (a)(2) and (d); and the definition of "action" in 50 C.F.R. 402.02 are reprinted at App., *infra*, 71a-76a.

STATEMENT

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA) requires that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary [of Commerce or the Interior], insure" that its actions are not likely to jeopardize the existence of any endangered or threatened species. 16 U.S.C. 1536(a)(2). The Forest Service is required by statute to formulate Land and Resource Management Plans (LRMPs) for units of the National Forest System. The court of appeals held that the mere existence of a forest plan is "action" within the meaning of Section 7(a)(2) of the ESA and that the Forest Service must reinitiate consultation on an existing plan upon the listing of a new species that may be affected by site-specific activities in the forest. The court rejected the government's contention that consultation on the site-specific activities themselves, and on any proposed amendments to the plans, would be sufficient to insure compliance with the ESA. Pursuant to the court of appeals' decision, the district court has enjoined (pending the completion of plan-level consultation) a broad range of site-specific activities that the Forest Service had previously

determined were not likely to adversely affect the newly listed species. Those rulings below have already substantially disrupted the management of federal lands and the consultation process under the ESA, and they threaten far-reaching consequences for the administration of more than 284 million acres of public lands in the Ninth Circuit.

1. The Department of Agriculture's Forest Service is responsible for managing the 191 million acres of land that comprise the National Forest System. See 58 Fed. Reg. 19,369 (1993). The Forest Service Manual provides for two levels of decisionmaking in the management of the System. See 53 Fed. Reg. 26,807, 26,809 (1988); 58 Fed. Reg. 19,370 (1993); *Sierra Club* v. *Robertson*, 28 F.3d 753, 758-759 (8th Cir. 1994); *Idaho Conservation League* v. *Mumma*, 956 F.2d 1508, 1511-1512 (9th Cir. 1992).

The first level involves decisions about plan documents. Under the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended by the National Forest Management Act of 1976, 16 U.S.C. 1600 *et seq.*, the Forest Service is required to prepare an LRMP (forest plan) for each unit of the National Forest System. "The forest plan consists of both forest-wide and area specific standards and guidelines that provide for land uses with anticipated resource outputs." 53 Fed. Reg. 26,809 (1988). With rare exceptions, the plans do not specify ground-disturbing activities (such as timber-cutting or road-building) that are permitted or required to go forward without further scrutiny. "The emphasis of the plan is not on site-specific decisions or specific resource outputs. Rather, the emphasis is on applying general management practices * * * to achieve multiple-use goals and objectives in the most cost efficient manner." *Id.* at 26,832. The plan establishes proposals (*ibid.*) that

> can be accomplished from a physical, biological, economic, and legal perspective. [But] [i]t is not certain that these

> proposals will be accomplished. First, the outputs proposed by the plan are projections or targets. For example, the number of acre-feet of water meeting water quality goals is a target number the forest will strive to attain. Another example is allowable sale quantity of timber. That is the maximum regulated volume of timber that can be sold over the planning period, not necessarily the volume that will be sold.

Forest plans serve as guides for the forests for ten to fifteen years. 16 U.S.C. 1604(f)(5). After plans are adopted, they may be changed by amendment (16 U.S.C. 1604(f)(4)) or by revision (16 U.S.C. 1604(f)(5)).

The second level of planning comes when site-specific activities are proposed. This phase requires an "analysis and evaluation of proposed actions" (53 Fed. Reg. 26,834 (1988)) based on "site-specific data" (*id.* at 26,836), not only to determine whether the proposed action is consistent with the forest plan, but also "to ensure compliance with [the National Environmental Policy Act of 1969], and to meet other appropriate laws and regulations" (*ibid.*), including the ESA. Significantly, such evaluations may result "in a decision not to proceed with a proposed project even though the project may be permissible under the Forest Plan." Clerk's Record (CR) 37(A) (Wallowa-Whitman Record of Decision) at 28.

2. The Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*, "represent[s] the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *TVA* v. *Hill*, 437 U.S. 153, 180 (1978). The Act serves "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such * * * species." 16 U.S.C. 1531(b). To those ends, the

ESA imposes on federal agencies a variety of duties.[1] In particular, Section 7(a)(2) requires that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary [of Commerce or the Interior], insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. 1536(a)(2).[2]

Although the Act does not prescribe the manner in which consultation shall be conducted, it contains several provisions designed to facilitate and expedite consultation. First, Section 7(c) provides that each federal agency shall, with respect to action for which no construction work has begun or been contracted prior to November 10, 1978, request information from the Secretary of the Interior or Commerce whether any listed species is present in the area of the proposed action. If the Secretary advises that such species may be present, the agency undertaking the action shall conduct a biological assessment for the purpose of identifying any listed species "which is likely to be affected by such action." 16 U.S.C. 1536(c). Second, Section 7(b)(3)(A) provides that promptly after the conclusion of consultation, the

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[1] Section 4 of the ESA provides for the listing of species as "threatened" or "endangered." 16 U.S.C. 1533. A threatened species is one "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. 1532(20). An endangered species is one "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. 1532(6).

[2] Responsibility for administration of the ESA is divided between the Fish and Wildlife Service (FWS), located within the Department of the Interior, and the National Marine Fisheries Service (NMFS), located within the Department of Commerce. See 16 U.S.C. 1532(15); 50 C.F.R. 402.01(b). Species within the jurisdiction of NMFS are listed at 50 C.F.R. 222.23(a) and 227.4. Other listed species (see 50 C.F.R. 17.11, 17.12) are subject to the jurisdiction of FWS. See 50 C.F.R. 402.01(b).

Secretary shall provide the federal agency with an opinion "detailing how the agency action affects the species or its critical habitat," 16 U.S.C. 1536(b)(3)(A); if the Secretary finds jeopardy to the species or adverse modificaton of critical habitat, the Secretary shall suggest reasonable and prudent alternatives that he believes would not violate Section 7(a)(2). 16 U.S.C. 1536(b)(3)(A).

Regulations promulgated jointly by the Secretaries of the Interior and Commerce furnish a structure for consultation under Section 7(a)(2). See 50 C.F.R. Pt. 402. The regulations provide that an agency shall "review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat." 50 C.F.R. 402.14(a). If the agency makes such a "may affect" determination, it is to initiate consultation. *Ibid.* If the agency further determines, however, that the action is "not likely to adversely affect" (NLAA) listed species or critical habitat, it may choose to initiate informal consultation; if it receives the written concurrence of the appropriate consulting agency (either FWS or NMFS), consultation is complete. 50 C.F.R. 402.14(b). If the action agency determines that the proposed action is "likely to adversely affect" listed species or critical habitat, or if the consulting agency does not concur in the action agency's determination that the proposed action is "not likely to adversely affect" the species, the agency must initiate formal consultation. 50 C.F.R. 402.13, 402.14.[3] That process culminates in the issuance by NMFS or FWS of a biological opinion and (if jeopardy or adverse habitat modification is found) a statement of reasonable and prudent alternatives.

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[3] While the phrase "may adversely affect" has been used frequently in this litigation by respondents and found its way into the district court's order (see App., *infra*, 61a), the Forest Service never made a finding that any of its activities "may adversely affect" the newly listed species. Its findings were limited to those specified in the regulations.

50 C.F.R. 402.14(g) and (h). The action agency is then responsible for making the final determination of whether to proceed with its proposed action. 50 C.F.R. 402.15.

Section 7(d) of the ESA, 16 U.S.C. 1536(d), limits the abiiity of federal agencies to commit resources during the consultation process. Section 7(d) states that

> [a]fter initiation of consultation required under [Section 7(a)(2)], the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate [Section 7(a)(2)].

16 U.S.C. 1536(d). Compliance with Section 7(d) is a statutory prerequisite for the grant of an exemption by the Endangered Species Committee pursuant to Section 7(h) of the ESA. See 16 U.S.C. 1536(h)(1)(A)(iv).[4]

3. In 1990, the Forest Service adopted LRMPs for the Wallowa-Whitman and Umatilla Forests in Oregon, following informal consultation with FWS concerning listed species within its jurisdiction. Pacific Rivers Council (PRC) Supp. ER 37(A), 37(C). On May 22, 1992, two other species found in those forests—the Snake River spring/summer chinook and fall chinook salmon, which are within the jurisdiction of

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[4] The Endangered Species Committee is composed of six designated federal officials and one individual from each affected State. 16 U.S.C. 1536(e)(3). The Committee may grant an exemption from the requirements of Section 7(a)(2) if it determines that "there are no reasonable and prudent alternatives to the agency action," 16 U.S.C. 1536(h)(1)(A)(i); that "the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest," 16 U.S.C. 1536(h)(1)(A)(ii); that "the action is of regional or national significance," 16 U.S.C. 1536(h)(1)(A)(iii); and that "neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by [Section 7(d)]," 16 U.S.C. 1536(h)(1)(A)(iv).

NMFS—were listed as threatened species. 57 Fed. Reg. 14,653 (1992); 50 C.F.R. 227.4(g) and (h).

Even before the listings, the Forest Service and NMFS had agreed to an approach for insuring that individual actions in the ecosystems that include the Wallowa-Whitman and Umatilla Forests would not jeopardize the two species. That approach, memorialized in an Inter-Agency Agreement consummated on March 6, 1992 (Gov't ER 86(5)), provided for the Forest Service to take steps at two levels. First, the Forest Service was to continue development of program-level guidance through the creation of conservation strategies for major drainages within the forests. The Agreement provided that the first prototype strategy would be developed within one year, *id.* at 2, and that the Forest Service would consider amending the previously approved forest plans to reflect the guidance in the conservation strategies. *Ibid.*[5] Second, the Forest Service was to prepare biological evaluations or assessments for all ongoing and future site-specific forest activities that might affect the newly listed species, initiate and utilize the consultation process in the regulations, and insure that site-specific activities were consistent with conservation strategies once they were adopted. *Ibid.*

When the species were listed, the Forest Service suspended all ongoing activities in the two forests except those that it determined would have no effect on, were not likely to adversely affect, or would have a beneficial effect on the listed

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[5] This first prototype conservation strategy was completed in October 1992. PRC ER 126, at 5. The Forest Service completed an environmental assessment under NEPA on a proposed amendment to the Wallowa-Whitman LRMP based on that prototype. During the formal process to amend the plan, the Forest Service is using the strategy in the prototype, as later modified, for any site-specific activities that have not been enjoined. See USDA Forest Service, Pacific Northwest Region, *Working Paper: Upper Grand Ronde Conservation Strategy for Endangered Snake River Spring Chinook Salmon* (1994).

species. The Forest Service also determined that those ongoing activities would be consistent with Section 7(d) of the Act, and it initiated consultation with NMFS regarding all ongoing activities other than those that it found would have no effect on the species. Finally, the Forest Service decided that new site-specific activities that might affect the species would not be implemented until consultation was completed on those activities. PRC ER 109, at 2.[6]

After the two new species were listed, the Regional Forester inquired whether NMFS also wished to enter into informal consultation on the existing forest plans themselves. Gov't ER 86(7) at 1. By letter dated December 8, 1992, the Regional Director of NMFS responded that such consultation would not be appropriate. He explained that

> the [Forest Service] action of adopting these LRMPs occurred in 1990. Also, LRMPs are planning documents that cover entire Forests over a relatively long time.

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[6] The Forest Service's initial evaluation of ongoing activities in the salmon watersheds considered 755 actions in the Umatilla Forest and 2806 in the Wallowa-Whitman Forest. PRC ER 123, at 6. In August 1992, the Forest Service initiated informal consultation with NMFS on all ongoing actions that it had classified as ones that "may affect" the species, as well as on new proposed actions, grouped by 11 subdrainages. PRC ER 109, at 2. In January 1993, the Forest Service initiated formal consultation on a grouping of actions in the Tucannon River Basin of the Umatilla Forest. *Ibid.* In February 1993, the Forest Service and NMFS agreed that, to facilitate consultation, most of the ongoing projects submitted for informal consultation would be resubmitted to NMFS grouped by watershed. PRC ER 123, at 8-9. The only exception was for 11 individual timber sales, for which NMFS issued a no jeopardy biological opinion in June 1993. *Id.* at 9. The then-pending Tucannon consultation, for which a biological opinion of no jeopardy was subsequently rendered in July 1993, served as a prototype for the grouping of projects by watershed. We have been informed that the Forest Service has now initiated consultation on all 16 watersheds in the Umatilla and Wallowa-Whitman Forests, with the last biological assessment submitted in April 1994.

> They do not identify specific actions that are reasonably certain to occur * * *. For these reasons, NMFS has determined that informal consultation on these LRMPs would not be constructive or necessary under the ESA at this time.

Id. at 2. The Regional Director further explained that the appropriate time for consultation on the forest plans "may be during the development of conservation strategies and on consequential amendments to the LRMPs. * * * Until that time, we should continue to consult on actions that are clearly defined and reasonably certain to occur," based on information about site-specific activities. *Id.* at 3.

4. Respondents Pacific Rivers Council *et al.* (PRC) are environmental organizations that claim that their members' interest in enjoying the newly listed species has been adversely affected by the Forest Service's failure to reinitiate consultation on the existing forest plans. App., *infra*, 21a. PRC filed suit, contending that the Forest Service was required to initiate consultation with regard to the existing LRMPs before undertaking or continuing site-specific actions in the two forests. Pending completion of consultation on the plans, PRC requested an injunction against various timber-harvesting, grazing, and road-building activities that the Forest Service had determined "may affect" the newly listed species, including ongoing activities that the Forest Service had already determined were not likely to adversely affect those species.

The district court found that the Forest Service had violated the ESA by failing to consult on the existing LRMPs. App., *infra*, 18a-44a. The court declined, however, to enter the broad injunction respondents sought. The court noted that respondents "have not challenged the [Forest Service's] determination that the identified actions do not constitute an irreversible or irretrievable commitment of resources," and

that it did not have a record before it "which would permit judicial review of these determinations." *Id.* at 44a. The court therefore held that "the scope of injunctive relief shall be limited to any proposed future actions within the Wallowa-Whitman and Umatilla forests which fall within the definition of a § 7(d) irreversible or irretrievable commitment of a resource during the consultation period." *Ibid.*

5. Respondents appealed, contending that a broader injunction should have been entered. The Forest Service cross-appealed, arguing that the mere continued existence of the LRMPs was not "agency action" requiring reconsultation on the plans themselves, and that the informal consultation begun by the Forest Service with respect to possible amendments to the LRMPs, together with consultation on site-specific actions, would insure protection for the species.

The court of appeals affirmed in part, reversed in part, and remanded. App., *infra*, 1a-17a. The court first held that LRMPs are "continuing agency action." *Id.* at 10a. The court next held that "the LRMPs are actions that 'may affect' the protected salmon because the plans set forth criteria for harvesting resources within the salmon's habitat." *Id.* at 12a. On that basis it "affirm[ed] the district court's order requiring the Forest Service to reinitiate consultation under § 7(a)(2)," making clear that "consultation on the entirety of both LRMPs is required, not just an amendment to the LRMPs." *Id.* at 13a & n.12.

The court also concluded that the injunction entered by the district court was insufficiently broad. The court held that until the Forest Service initiated consultation on the LRMPs, it could not allow the continuation of *any* site-specific activity (*e.g.*, timber-harvesting, road-building, or grazing) that it had previously determined "may affect" the newly listed salmon. App., *infra*, 15a. The court further specified that "the activity cannot go forward even after consultation is initiated if it represents an irreversible and

irretrievable commitment of resources as prohibited by § 7(d)." *Id.* at 15a n.15. The court elaborated:

> Because § 7(d) could not serve as the basis for permitting *any* agency action at the time of the hearing, we need not address the district court's rulings on whether the various commitments of resources were irreversible and irretrievable. If the Forest Service initiates consultation on the LRMPs, the court must decide if the ongoing or announced activities can proceed during the consultation period. It may find guidance in [*Lane County Audubon Soc'y* v. *Jamison*, 958 F.2d 290 (9th Cir. 1992)], where we held that the Bureau of Land Management could not go forward with any new sales of timber until consultation on a forest management plan and its effect on the threatened species was completed. Most importantly, we held that timber sales constitute *per se* irreversible and irretrievable commitments of resources under § 7(d) and thus could not go forward during the consultation period. *Lane County*, 958 F.2d at 295.

Id. at 16a. The court concluded by ordering a "REMAND to the district court to modify its injunction to include the ongoing and announced timber, range and road projects. This shall not preclude the district court from considering further modifications to its injunction, in accordance with our opinion, if and when consultation is reinitiated." *Id.* at 17a.[7]

6. Shortly after issuance of the panel's decision, the Forest Service initiated consultation on the two forest plans. That process is currently ongoing. On October 20, 1994, the district court issued its opinion on remand. App., *infra*, 48a-60a. The district court enjoined, pending completion of consultation on the plans, all timber-harvesting and road-building

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[7] The court of appeals denied the government's petition for rehearing with suggestion of rehearing en banc. App., *infra*, 65a-66a.

activities that the Forest Service had previously determined "may affect" the newly listed species, including those that the Forest Service had further concluded were "not likely to adversely affect" the species. *Id.* at 61a-62a.[8]

REASONS FOR GRANTING THE PETITION

The court of appeals erred in holding that Section 7(a)(2) of the Endangered Species Act required the Forest Service to consult with the National Marine Fisheries Service about forest plans it had previously adopted. The mere existence of a forest plan is not agency "action" within the meaning of Section 7(a)(2). That conclusion is confirmed by the ESA regulations, which define "action" to include the "promulgation of regulations," but not their mere existence. 50 C.F.R. 402.02.

In any event, Section 7(a)(2) of the ESA does not require that consultation under the Act take place in any particular manner. Section 7(a)(2) simply directs the action agency to "insure," in consultation with and with the assistance of the Secretary of the Interior or Commerce, that its actions are not likely to jeopardize the continued existence of a listed species. Section 7(a)(2) therefore provides no basis for a court to order that consultation be carried out in some other manner where, as here, the action and consulting agencies have determined that consultation on future plan amendments and site-specific actions will be sufficient to insure protection for newly listed species. The court of appeals' contrary holding compels the responsible agencies to divert scarce public resources to the fulfillment of potentially cumbersome procedural measures that both agencies have determined to be unnecessary to achieve compliance with the ESA.

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[8] Both parties have filed notices of appeal from the district court's decision on remand.

Those disruptive consequences are compounded by the sweeping injunctive relief ordered by the courts below. That relief was entered without any showing by respondents or any finding by the courts that particular site-specific actions would be likely to jeopardize the continued existence of the species (and thereby violate Section 7(a)(2) of the Act); that such activities would be likely to result in substantial harm to the species; or even that the Forest Service had erred in its determination that the site-specific activities it allowed to continue were not likely to adversely affect the species at all. Such intrusion into the management of public lands flouts established equitable principles.

The potential consequences of the decision below are particularly serious in light of the vast expanse of public lands within the Ninth Circuit. The principal federal land management agencies—the Forest Service and the Department of the Interior's Bureau of Land Management (BLM)—have 186 land management plans covering approximately 284 million acres within the Ninth Circuit. The consulting agencies have proposed for listing 58 new species in the geographic area within the court of appeals' jurisdiction. The question whether the ESA or implementing regulations require plan-level consultation whenever a new species is listed, and the proper scope of injunctive relief, are of exceptional public importance to effective administration of the ESA and to the management of federal lands.

1. The court of appeals committed two basic errors in holding that the Forest Service was required to consult on the existing forest plans: (a) the mere existence of a plan is not "action" within the meaning of Section 7(a)(2) of the ESA, and (b) Section 7(a)(2) does not in any event require the Forest Service to consult about forest plans themselves, so long as it otherwise fulfills its duty to insure that site-specific activities are not likely to jeopardize the continued existence of listed species or adversely affect their critical habitat.

a. Section 7(a)(2) and the regulations jointly issued by the Secretaries of the Interior and Commerce provide for consultation with respect to agency "actions." See 16 U.S.C. 1536(a)(2); 50 C.F.R. 402.12-402.14. The National Forest Management Act recognizes three plan-level action points: plan adoption, amendment, and revision. 16 U.S.C. 1604(d), (f) and (j). Project-level decisions to authorize particular site-specific activities in a forest are "actions" as well. But the mere existence of an LRMP is not "action" by the agency.

The joint regulations confirm that interpretation. Under those regulations, the term "action" is defined to include, *inter alia*, "the *promulgation* of regulations" and "the *granting* of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid." 50 C.F.R. 402.02 (emphasis added). That definition implies that the *adoption* of agency policy (such as an agency regulation, or the plans at issue here) is an "action," but that "the policy itself" is not.

ESA consultation with respect to programmatic documents is analogous in this respect to the solicitation and consideration of public comment by federal agencies governed by the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, prior to the promulgation of regulations. See 5 U.S.C. 553. An agency's decision to amend or repeal an existing regulation is expressly defined as "rule making," see 5 U.S.C. 551(5), and is subject to the notice-and-comment provisions. See *Environmental Defense Fund, Inc.* v. *Gorsuch*, 713 F.2d 802, 815-816 (D.C. Cir. 1983). An agency is under no ongoing duty, however, to consult with the public regarding the effect of an existing rule.[9] Similarly here, the adoption or

[9] Numerous statutes provide that judicial review of agency rules must take place within a specified period after a regulation or standard is promulgated. See, *e.g.*, Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1855(d) (suit must be brought within 30 days after promulgation); Clean Water Act, 33 U.S.C. 1369(b) (suit must be brought within 120 days after promulgation). Under such statutes, the "action" for

amendment of an LRMP is an "action," but the plan itself is not.

The conduct of the action and consulting agencies with respect to the LRMPs at issue here was fully consistent with that distinction. Prior to adoption of the LRMPs, the Forest Service and FWS engaged in informal consultation and determined that adoption of the plans was not likely to adversely affect the species that were listed at that time.[10] Shortly after the new listings, NMFS noted that "the [Forest Service] action of adopting these LRMPs occurred in 1990" and that reconsultation on the plans themselves "would not be constructive or necessary." Gov't ER 86(7) at 2. NMFS further explained that "LRMPs are planning documents that cover entire Forests over a relatively long time. They do not

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purposes of APA review is the promulgation of the rule or standard rather than the rule or standard itself.

[10] Although the Forest Service consulted with FWS prior to adopting the plans (and although the Forest Service Manual provides for such consultation, see FSM § 2671.45c(1.) (1994); PRC ER 123, at 2-3), it does not follow that such consultation is required by Section 7(a)(2). Adoption of an LRMP concededly is agency "action" subject to the requirements of Section 7(a)(2). But the Forest Service might reasonably decide that consultation elsewhere in the management process would adequately insure that the various site-specific activities the Service "authorizes, funds, or carries out" in the forests would not be likely to jeopardize listed species.

Where a plan is in some respect self-executing (in the sense that it specifies a category of on-the-ground activities that will thenceforth be required or permitted to go forward without further scrutiny), it is possible that consultation on that aspect of the plan prior to its adoption will be the only feasible way to insure that the continued existence of a listed species is not jeopardized. But where, as here, a plan (or agency policy) envisions that consultation will occur prior to any site-specific activity that may affect a listed species, the agency reasonably could conclude that it has "insure[d]" that its "action" of adopting the plan will not be likely to jeopardize the species. Of course, consultation prior to adoption of an LRMP may be sound policy even where it is not required by the ESA.

identify specific actions that are reasonably certain to occur in the Snake River sub-basins that contain species listed under the Endangered Species Act." *Ibid.*

This understanding of the nature of LRMPs is consistent with that of the Eighth Circuit in *Sierra Club* v. *Robertson*, 28 F.3d 753 (1994), which noted that "[a] forest plan * * * is a general planning tool. It provides guidelines and approved methods by which forest management decisions are to be made for a period of ten to fifteen years. Adoption of the Plan does not effectuate any on-the-ground environmental changes." *Id.* at 758. That understanding of the relationship between forest plans and site-specific activities cannot be reconciled with the Ninth Circuit's assertion in the present case that "the LRMPs are actions that 'may affect' the protected salmon because the plans set forth criteria for harvesting resources within the salmon's habitat." App., *infra*, 12a.[11]

The court of appeals' requirement of plan-level consultation rests on the apparent belief that the LRMPs themselves must be treated as "actions" in order to insure that site-specific activities in the forests are consistent with the strictures of Section 7(a)(2).[12] There is no basis for that concern. Section

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[11] See also *Portland Audubon Soc'y* v. *Babbitt*, 998 F.2d 705, 708 (9th Cir. 1993) (Timber Management Plans "necessarily drive the location and volume decisions which eventually culminate in a particular sale site being offered at auction"); *Idaho Conservation League* v. *Mumma*, 956 F.2d 1508, 1516 (9th Cir. 1992) ("To the extent that the plan pre-determines the future, it represents a concrete injury"); *Sierra Club* v. *Marita*, No. 94-1736 (7th Cir. Jan. 20, 1995), slip op. 8.

[12] The court of appeals characterized the government's argument as being that "the ESA does not apply to programs or activities undertaken before the listing of a species." App., *infra*, 11a. That is not and has not been the government's view. Consistent with this Court's decision in *TVA* v. *Hill*, 437 U.S. 153 (1978), the government has argued that the ESA does not require reconsultation, upon the listing of a new species, with respect to agency actions that have already been *completed*. See *id.* at 186 n.32 (Section 7 "affects all projects which remain to be authorized, funded, or

7(a)(2) assuredly imposes upon the Forest Service an ongoing duty to insure, in consultation with FWS or NMFS, that site-specific activities do not jeopardize newly listed species, even when those activities are consistent with an LRMP adopted prior to the listing. The court was therefore undoubtedly correct in recognizing that an existing LRMP may not be blindly or mechanically relied upon as a basis for authorizing site-specific actions without taking account of changed circumstances, such as the listing of new species.[13] Moreover,

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carried out"). We fully recognize, however, that Section 7(a)(2) imposes upon federal agencies a continuing duty to insure that their actions do not jeopardize newly listed species, even if those actions were planned or initiated prior to the listing. For example, even after a permit has been issued, the issuing agency has a continuing obligation to insure that the activities authorized by the permit do not jeopardize a listed species, so long as the agency retains the ability to revoke or modify the permit.

In the court of appeals, respondents relied in part on 50 C.F.R. 402.16, which requires "[r]einitiation of formal consultation" upon the listing of a new species if "discretionary Federal involvement or control over the action has been retained or is authorized by law." Contrary to respondents' contention, Section 402.16 does not require plan-level reconsultation here. The pertinent "action" for which consultation was previously undertaken was the *adoption* of the LRMPs—not the plans themselves. The Forest Service retains no discretionary involvement or control over that now-completed action, although it does retain discretion to amend or revise the plans. Section 402.16, moreover, governs "[r]einitiation of formal consultation," and thus by its terms applies only to actions for which formal consultation was initially undertaken. The adoption of the LRMPs at issue here was originally the subject of *informal* consultation.

[13] Indeed, the LRMPs themselves make clear that a site-specific activity that would violate the ESA may not go forward even if it is consistent with the applicable plan. See, *e.g.*, Gov't ER 84A (Wallowa-Whitman LRMP) at 4-31 ("Where [recovery] plans conflict with other management direction, the recovery plans will take precedence."); Gov't ER 84B (Umatilla LRMP) at 4-89 ("Legal and biological requirements for the conservation of endangered, threatened and sensitive plants and animals will be met."); Gov't ER 84C (FEIS for Wallowa-Whitman LRMP)

when consultation occurs on a proposed site-specific action, NMFS will be assured an opportunity to examine that action in a broader context, taking into account cumulative effects of other federal and non-federal activities, see 50 C.F.R. 402.14(g)(3), as well as programmatic considerations reflected in the forest plans and other documents and guidelines. But to say that the site-specific actions are subject to Section 7(a)(2)'s substantive mandate does not mean that the mere existence of the plan is an "action" or that consultation must be conducted on the plan itself. The court of appeals therefore erred in usurping the agencies' role in determining the appropriate procedures for insuring compliance with the ESA's substantive mandate.

b. Having determined that the LRMPs constituted "continuing agency action," see App., *infra*, 10a, the Ninth Circuit concluded—essentially without analysis—that Section 7(a)(2) of the ESA required the Forest Service "to enter into consultation on the *LRMPs themselves*." *Id.* at 14a. That conclusion cannot be sustained. Section 7(a)(2) requires that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary [of Commerce or the Interior], insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. 1536(a)(2). That provision does not, however, speak to the *manner* in which ESA consultation must be conducted. Thus, even if the mere existence of an LRMP were properly regarded as "action," it would not follow that the agency must consult with respect to the plan itself, or that any such consultation must begin immediately upon the listing of a new species. Rather, the ESA would simply require the agency to engage in consultation at such time and

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at IV-19 ("Regardless of the alternative, protection of listed species will take precedence over other land management direction.").

in such manner as is necessary to "insure" that site-specific activities carried out under the plan would not be likely to jeopardize the continued existence of the newly listed species.

In this case, the action and consulting agencies determined that future consultations on plan amendments and site-specific activities would be sufficient to insure that the newly listed salmon species would not be jeopardized. That expert judgment in this complex area by the agency charged with fashioning forest plans and one of the agencies charged with furnishing consultation advice under the ESA is entitled to very substantial deference. See, *e.g.*, *Thomas Jefferson University* v. *Shalala*, 114 S. Ct. 2381, 2386-2387 (1994). The court of appeals did not purport to hold that the agencies' determination was arbitrary or capricious. Rather, the Ninth Circuit assumed that under Section 7(a)(2), the duty to consult "on the *LRMPs themselves*" followed *necessarily* from the court's identification of the plans as agency "action." See App., *infra*, 14a. There is simply no basis for that reading of the statutory language.

This is not to say that plan-level consultation is never an appropriate means of assuring compliance with Section 7(a)(2)'s substantive mandate. Even where later site-specific consultations would be sufficient to prevent jeopardy to listed species, plan-level consultation may frequently benefit both the action and consulting agencies by facilitating consideration of programmatic issues, identifying common characteristics or potentially cumulative effects of numerous site-specific activities, and thereby creating greater economies of scale by reducing the scope and complexity of subsequent consultations on site-specific actions. Nothing in the Act or regulations would preclude the action or consulting agency from requesting plan-level consultation for these

purposes.[14] Plan-level consultation may not be compelled by judicial decree, however, where the plan does not have self-executing features (*i.e.*, where the plan does not direct or authorize site-specific activities that will not be subject to further scrutiny). Cf. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978) ("this Court has for more than four decades emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments").[15]

c. The court of appeals' decision threatens substantially to undermine the efforts of federal agencies to implement the requirements of the ESA in a manner that does not unduly disrupt their management of public lands. The question, we emphasize, is not whether site-specific or programmatic consultation is the superior method of insuring compliance with the Act. Rather, ESA consultation takes place at a wide variety of levels of generality.[16] Plan-level consultation is

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[14] Indeed, plan-level consultation may be one means by which the Forest Service could implement its distinct (albeit general) duty under Section 7(a)(1), in consultation with and with the assistance of the Secretary of the Interior or Commerce, to "utilize [its] authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of endangered species and threatened species." 16 U.S.C. 1536(a)(1).

[15] The ESA does not require federal land management agencies to generate programmatic documents at all, let alone to consult at the plan level where such documents do exist. Plan-level consultation is therefore required by the ESA only to the extent that the affected agencies determine such consultation to be essential in order to insure compliance with Section 7(a)(2)'s substantive mandate.

[16] The Forest Service is currently consulting at the project level, the individual plan level, and the multiple forest plan level, to address the needs of the salmon species at issue in this case. At the project level, in addition to the completed consultation on the 11 timber sales and the Tucannon watershed, as of December 6, 1994, the Forest Service has

typically undertaken prior to the adoption of an LRMP; amendments to an existing plan are preceded by consultation as well, as are site-specific activities undertaken pursuant to the plans. Moreover, recognizing that plants and animals do not honor the artificial boundaries of agency planning documents, agencies have increasingly undertaken ESA

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submitted to NMFS 68 biological assessments covering numerous individual projects grouped by watershed on nine national forests in the entire Snake River Basin. In the two of those nine forests at issue here, all watershed biological assessments for projects are complete and have been submitted to the NMFS. See note 6, *supra*.

At the plan level, the Forest Service timely prepared its prototype conservation strategy pursuant to its March 6, 1992, Agreement with NMFS. It presently is in the process of amending the Wallowa-Whitman Forest Plan. Conservation strategies for other specific watersheds have been put on hold, pending completion of work on the prototype and a more general strategy known as PACFISH. At the same time that the Forest Service has been in consultation on these individual and watershed proposals, it has undertaken three other programmatic strategies to address the needs of the listed species, two of which affect the two forests at issue in this case. One of these is PACFISH, an ecosystem-based, interim management strategy. 59 Fed. Reg. 14,356 (1994). PACFISH will result in amendments to 15 National Forest plans in four States, including the two here, and would serve as the basis for instructional memoranda to seven BLM districts in four States. *Ibid.* The PACFISH management strategy will serve as interim protection for anadromous fish, including the listed species, until the completion of an environmental impact statement on proposed plan amendments to address the needs of the species at the most general plan level. The Forest Service and BLM have also noticed their intent to prepare two environmental impact statements that will accompany plan amendments. See Eastside Ecosystem Management Strategy, Pacific Northwest Region, Notice of Intent To Prepare an Environmental Impact Statement, 59 Fed. Reg. 4680 (1994), revised notice, 59 Fed. Reg. 26,624 (1994); Upper Columbia River Basin Ecosystem Management Strategy, Northern and Intermountain Regions, Notice of Intent To Prepare an Environmental Impact Statement, 59 Fed. Reg. 63,071 (1994). The Eastside Strategy would result in amendments to the two forest plans in this case, as well as to other forest plans.

consultation on an ecosystem basis. The PACFISH, Eastside, and Upper Columbia River Basin strategies instituted by the Forest Service and BLM are all evidence of this change in approach. See note 16, *supra*. The President's Strategy for the Pacific Northwest (see 59 Fed. Reg. 18,788 (1994)), recently upheld by the district court in *Seattle Audubon Soc'y* v. *Lyons*, No. C92-479 WD (W.D. Wash. Dec. 21, 1994), is another. That strategy, which is specifically designed to formulate ecosystem-wide guidance and standards for managing forest resources, including the Northern Spotted Owl, has resulted in the amendment of 13 forest plans and six BLM plans in the Pacific Northwest.

The government therefore has no quarrel with the proposition that various forms of programmatic consultation may often help to prevent jeopardy to listed species. The court of appeals' decision, however, substantially disrupts the administration of the ESA by displacing the decision of the action and consulting agencies regarding the appropriate means of conducting consultation in a particular context. Here the agencies agreed that site-specific consultation and consultation on future amendments would be appropriate. The Ninth Circuit's contrary determination has no basis whatever in Section 7(a)(2) of the ESA—on which the court of appeals placed primary reliance—and it is not required by regulation. The court's directive to engage in plan-level consultation has compelled both the action and consulting agencies to divert substantial public resources to an undertaking that both agencies had previously determined to be unnecessary.[17]

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[17] Judicially imposed consultation on existing LRMPs that do not contain standards and guidelines specifically designed to address the needs of the newly listed species can be expected to result in nothing more than a decision to amend the plans to incorporate new standards and guidelines. That additional paperwork provides no benefit to the species, however, since here the Forest Service had already decided to establish standards and guidelines addressing those species and is already engaged in

2. The disruptive effects of the court of appeals' decision go well beyond the diversion of agency resources to superfluous plan-level consultation. The decision has the additional deleterious effect of imposing substantial and unwarranted limitations on the use of public lands during the pendency of the consultation process. This Court has repeatedly emphasized that "[t]he grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 313 (1982). Rather, "the bases for injunctive relief are irreparable injury and inadequacy of legal remedies. In each case, a court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Production Co.* v. *Village of Gambell*, 480 U.S. 531, 542 (1987). The injunctive relief awarded in the present case flouts that well-established principle and has no basis in this Court's ESA jurisprudence.

The district court on remand enjoined a broad range of timber-harvesting activities that the Forest Service had determined were "not likely to adversely affect" (NLAA) the newly listed species. Respondents made no effort to demonstrate, and neither of the courts below purported to find, that any of those NLAA determinations were arbitrary and capricious. Rather, the district court's decision to enjoin all NLAA timber sales was based on (1) its belief that it was required to do so by the terms of the Ninth Circuit's opinion, see App., *infra*, 54a, and (2) its conclusion that "[u]ntil [plan-level] consultations reach a stage at which reasonable and prudent alternatives are identified in the [biological opinion]

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consultation on the standards and guidelines that will form the basis for plan amendments.

process, any § 7(d) analysis necessarily must be premised upon guesswork," *id.* at 56a. The district court concluded that "rather than engage in this guesswork, I find that all NLAA timber activities, save and except any that may fall within the stipulation of the parties, must be halted at least until reasonable and prudent measures are identified within the § 7(a)(2) consultation process for the LRMPs." *Ibid.*

Thus, neither the court of appeals nor the district court on remand purported to assess the likelihood that any of the timber sales in question would actually harm the newly listed species. Rather, the court of appeals implicitly, and the district court explicitly, concluded that during the pendency of the plan-level consultation, all doubts regarding the effects of individual sales should be resolved against their implementation. That *per se* rule of injunctive relief is entirely contrary to traditional principles of equity.[18]

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[18] Under the court of appeals' decision, the "action" that violated the ESA was the continued existence of the plans in the absence of consultation. That action is distinct from individual, site-specific actions that are the subject of the injunction ordered below. Having determined that the existing LRMPs were deficient (because they did not take into account the newly listed species), the court might have sought to order the Forest Service to come into compliance with the ESA by enjoining it from relying on the plans as a justification for going forward with particular site-specific actions. Cf. *Romero-Barcelo*, 456 U.S. at 314-316; *Village of Gambell*, 480 U.S. at 544-545. But the Forest Service has never contended that site-specific actions may be allowed to proceed simply because they are consistent with the LRMPs. Rather, it has undertaken an individualized assessment of the effects on listed species of *each* of the site-specific activities enjoined by the district court. The purported invalidity of the plans provides no basis for an injunction against those site-specific actions, since nothing in the ESA or implementing regulations requires a federal agency to adopt a forest plan or otherwise to pursue a programmatic approach to land management, and nothing in the ESA automatically renders a site-specific action unlawful where a federal agency has adopted a forest plan but failed to consult about the relationship of that plan to a newly listed species.

Nothing in this Court's ESA jurisprudence suggests an exception to the rule that injunctive relief is appropriate only upon a showing of irreparable injury. In *TVA* v. *Hill*, this Court considered a proposed agency action—the closing of the gates of the Tellico Dam—which all parties conceded would lead to the eradication of the snail darter, an endangered species. See 437 U.S. at 173-174. In light of the "irreconcilable conflict between operation of the Tellico Dam and the explicit provisions of § 7 of the Endangered Species Act," *id.* at 193, the Court held that Congress's determination to "afford[] endangered species the highest of priorities," *id.* at 194, could be effectuated only by enjoining the dam's operation. Denial of an injunction under those circumstances, the Court reasoned, could not be squared with Congress's decision absolutely to forbid agency action that would result in the destruction of an endangered species' critical habitat. *Id.* at 193-195.[19] *TVA* v. *Hill* thus makes clear that in ESA cases a

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Rather, the propriety of injunctive relief against site-specific actions depends upon the probable effect of those actions upon a listed species. Cf. *Romero-Barcelo*, 456 U.S. at 314 ("The integrity of the Nation's waters, however, not the permit process, is the purpose of the [Federal Water Pollution Control Act]"). At the core of the ESA is Section 7(a)(2)'s prohibition against actions that are "likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. 1536(a)(2). We may assume, arguendo, that a plaintiff seeking injunctive relief in circumstances such as these is not required to establish that the action in question actually is likely to cause the extirpation of a listed species. But that substantive standard in Section 7(a)(2) must be the central focus of a court in considering equitable relief, and plaintiffs therefore must at least demonstrate that the particular site-specific actions they seek to have enjoined are likely to cause substantial harm to the species—a showing that respondents have entirely failed to make.

[19] See *Village of Gambell*, 480 U.S. at 543 n.9 (explaining *TVA* v. *Hill* by noting that the ESA "contains a flat ban on destruction of critical habitats of endangered species and it was conceded that completion of the dam would destroy the critical habitat of the snail darter"); *Romero-*

court's equitable discretion is to some degree constrained: The extirpation of a listed species cannot be balanced against competing considerations in determining whether injunctive relief is appropriate. The decision does not suggest, however, that the ESA provides a basis for enjoining activities that have not been shown to entail substantial harm to the species.

Prior Ninth Circuit decisions had significantly extended the rule announced in *TVA* v. *Hill* by holding that, "[g]iven a substantial procedural violation of the ESA in connection with a federal project, the remedy must be an injunction of the project pending compliance with the ESA." *Thomas* v. *Peterson*, 753 F.2d 754, 764 (9th Cir. 1985); accord *Sierra Club* v. *Marsh*, 816 F.2d 1376, 1384 (9th Cir. 1987). Even those decisions, however, "do not stand for the proposition that courts no longer must look at the likelihood of future harm before deciding whether to grant an injunction under the ESA." *National Wildlife Federation* v. *Burlington Northern R.R.*, 23 F.3d 1508, 1511 (9th Cir. 1994). In the present case, the courts below have gone well beyond prior circuit precedent by ordering injunctive relief in the absence of any showing of likely harm to the species.

Finally, even apart from the court of appeals' failure to require a showing of substantial harm to the species as a predicate for injunctive relief, there is no basis for the court's assertion that "timber sales constitute *per se* irreversible and irretrievable commitments of resources under § 7(d) and thus could not go forward during the consultation period." App., *infra*, 16a (citing *Lane County Audubon Soc'y* v. *Jamison*, 958 F.2d 290 (9th Cir. 1992)). Whatever the merits of the Ninth Circuit's earlier decision in *Lane County*—which held

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Barcelo, 456 U.S. at 314 ("It was conceded in *Hill* that completion of the dam would eliminate an endangered species by destroying its critical habitat. Refusal to enjoin the action would have ignored the 'explicit provisions of the Endangered Species Act.' ").

that timber sales would constitute "irreversible and irretrievable commitments of resources" during the pendency of consultation regarding a species (the Northern Spotted Owl) whose habitat was the trees themselves—that decision has no logical application to the salmon species involved in this case. Moreover, Section 7(d) forbids only an "irreversible or irretrievable commitment of resources with respect to the agency action *which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate [Section 7(a)(2)]*." 16 U.S.C. 1536(d) (emphasis added). Although the court of appeals stated that the timber sales "could not go forward during the consultation period," App., *infra*, 16a, it entirely failed to address the question whether those sales would foreclose the implementation of reasonable and prudent alternatives to jeopardy.[20]

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[20] Section 7(d) was enacted soon after this Court's decision in *TVA* v. *Hill;* together with the exemption procedure in Section 7(h), it was intended to prevent repetition of the Tellico Dam experience. The prohibition in Section 7(d) is not limited to actions that are likely to jeopardize a listed species—which would in any event be prohibited by Section 7(a)(2). It extends as well to actions, such as "the investments of large sums of money" in a project that may ultimately cause jeopardy, *North Slope Borough* v. *Andrus*, 486 F. Supp. 332, 356 (D.D.C.), aff'd in part, rev'd in part on other grounds, 642 F.2d 589 (D.C. Cir. 1980), that do not themselves adversely affect the species but may place the agency in a lose-lose situation—*e.g.*, a nearly completed dam that cannot be put into operation without eradicating a listed species and cannot be abandoned without substantial waste of public resources.

Compliance with Section 7(d) is a statutory prerequisite to the grant of an exemption by the Endangered Species Committee pursuant to Section 7(h) of the ESA. See 16 U.S.C. 1536(h)(1)(A)(iv). Thus, an agency's commitment of resources in violation of Section 7(d), by rendering an exemption unavailable, may ultimately lead to the waste of substantial public funds. That result is of course undesirable, even where the commitment of resources is not likely to adversely affect the species. So

3. The court of appeals has misconstrued the ESA, improperly interfered with the discretion of the expert agencies to select the most appropriate manner of consultation under Section 7(a)(2), and ordered sweeping injunctive relief in disregard of established equitable principles. The practical consequences of those rulings are particularly great in light of the vast expanse of federal lands within the Ninth Circuit and the anticipated volume of new listings within the near future. Over 284 million acres of federal land are within the jurisdiction of the court of appeals, representing approximately 64% of the National Forest System and 74% of the public domain managed by BLM. This vast acreage is covered by approximately 186 planning documents.[21] The consulting agencies have proposed for listing 58 new species in the geographic area within the Ninth Circuit. The requirement that plan-level consultation be conducted upon the listing of each new species will substantially undermine the ability of the consulting and land-use agencies to administer the ESA and public lands in an effective and workable manner.

The broad ramifications of the Ninth Circuit's rulings already are evident from the other lawsuits that have been brought in the wake of the decision below. One district court, relying on the Ninth Circuit's decision in this case, entered an injunction that would have shut down 343 ongoing activities (48 timber sales, 204 authorized grazing operations,

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long as it inflicts no substantial harm upon a listed species, however, the possibility of such wastefulness provides no basis for an injunctive remedy.

[21] The Forest Service has 67 plans covering 122 million acres of land within the jurisdiction of the court of appeals. See 36 C.F.R. 200.2; USDA Forest Service, *Report of the Forest Service: Fiscal Year 1993*, at 90 (May 1994). We have been informed that BLM has 64 Resource Management Plans covering 113 million acres of land and 55 Management Framework Plans covering 49 million acres of land.

5 road construction or reconstruction projects, and 86 mining activities) in eight National Forests in the Snake River Basin in Idaho, despite the Forest Service's determination that those activities are "not likely to adversely affect" the same two species of salmon. *Pacific Rivers Council* v. *Thomas*, Civ. No. 94-0159-S-DAE (D. Idaho Jan. 12, 1995). On January 25, 1995, the court temporarily stayed the injunction until March 15, 1995, pursuant to a stipulation of the parties. That injunction would have eliminated approximately 800 jobs directly impacted by the immediate cessation of 41 of those activities, with many more jobs affected later in the year. Plaintiffs in a second lawsuit seek to enjoin all ground-disturbing projects on 11 National Forests in Arizona, New Mexico, Utah, and Colorado. *Silver* v. *Thomas*, Civ. No. 94-127712-5 (D. Ariz. filed Aug. 9, 1994). In addition, the government has received several notices of intent to sue challenging the failure to consult on other forest plans, including one notice that points to more than 40 species that have been listed under the ESA since adoption of the LRMPs for National Forests in the Southwest Region. Letter from David Hogan to Mike Espy (Oct. 11, 1994). Review by this Court therefore is warranted.[22]

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[22] Although there is some uncertainty as to precisely when the ongoing consultation on the LRMPs in this case will be completed, the process can be expected to be completed within the next month or two. Thus, if this Court grants the petition for a writ of certiorari, the question whether programmatic reconsultation on the two plans at issue here was required upon the listing of the new species may be moot by the time that the Court decides the case. In light of the anticipated new listings and the typical duration of plan-level consultation, however, we believe that the dispute is "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911).

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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FEBRUARY 1995

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 93-36162 and 94-35042

PACIFIC RIVERS COUNCIL; ORGEGON NATURAL RESOURCES COUNCIL; HELLS CANYON PRESERVATION COUNCIL; THE WILDERNESS SOCIETY; OREGON NATURAL DESERT ASSOCIATION, PLAINTIFFS-APPELLANTS-CROSS-APPELLEES

v.

JACK WARD THOMAS, IN HIS OFFICIAL CAPACITY AS CHIEF OF THE U.S. FOREST SERVICE; UNITED STATES FOREST SERVICE, DEFENDANTS-APPELLEES-CROSS-APPELLANTS

Argued and Submitted Apr. 6, 1994
Decided July 7, 1994

ORDER

Before: WRIGHT, TANG and REINHARDT, Circuit Judges.

REINHARDT, Circuit Judge:

OVERVIEW

Plaintiffs-appellants Pacific Rivers Council, *et al.* (PRC) appeal the district court's grant of a partial injunction. This injunction bars the United States Forest Service (Forest Service) from announcing, awarding or conducting any additional timber sales, range activities, or road building projects in the Wallowa-Whitman and Umatilla National Forests until it commences consultation procedures as required by the Endangered Species Act § 7(a)(2), 16 U.S.C. § 1536(a)(2) (ESA). The basis for the injunction was that the Forest Service had failed to consult with the National Marine Fisheries Service (NMFS) regarding the effects of certain Land and Resource Management Plans (LRMPs) on the Snake River chinook salmon, a species recently listed as "threatened" under the ESA. PRC argued that the district court should enjoin ongoing or announced timber, range, and road projects that the Forest Service had determined were not likely to affect the chinook. The district court accepted the Forest Service's determination that these projects were not irreversible or irretrievable commitments of resources in violation of ESA § 7(d), 16 U.S.C. § 1536(d).

The Forest Service also appeals the district court's order. It argues that because the LRMPs were adopted before the chinook were listed as a "threatened" species, the LRMPs are not agency actions requiring consultation under § 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2). It also argues that even if the LRMPs are deemed agency actions, the Forest Service has already begun informal consideration of potential amendments to the LRMPs to address the

listed chinook, making reinitiation of consultation superfluous.

We affirm the district court's judgment granting an injunction against the Forest Service pending compliance with the ESA. The LRMPs are important programmatic documents that set out guidelines for resource management in the forests involved in this case. As such, the LRMPs constitute continuing agency action requiring consultation under § 7(a)(2) of the ESA. We reverse, however, the district court's judgment denying an injunction against all ongoing and announced timber, range, and road projects. The district court erred in interpreting § 7(d) of the ESA to allow the ongoing activities to continue when the Forest Service had failed to enter into consultation as required by § 7(a)(2) of that statute. Accordingly, we remand to the district court with instructions to reconsider whether the ongoing and announced timber, range and road projects are irreversible and irretrievable commitments of resources which must be enjoined during consultation on the LRMPs between the Forest Service and NMFS.

FACTS

In 1990, the Forest Service promulgated and approved both the Wallowa-Whitman and the Umatilla Forest LRMPs.[1] These LRMPs establish forest-wide and area-specific standards and guidelines to which all projects must adhere for up to 15 years. The LRMPs identify lands suitable for timber production and other uses, and establish an allowable sale quantity of timber and production targets and

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[1] The Wallowa-Whitman LRMP was approved on April 23, 1990 and the Umatilla LRMP was approved on June 11, 1990.

schedules for forage, road construction, and other economic commodities. The LRMPs also seek to provide adequate fish and wildlife habitat to maintain viable populations of existing native species, and "include measures for preventing the destruction or adverse modification of critical habitat for threatened and endangered species." 36 C.F.R. § 219.1(a); 219.27(6) & (8). Every resource plan, permit, contract, or any other document pertaining to the use of the forest must be consistent with the LRMP. 16 U.S.C. § 1604(i).

Anticipating the listing of the Snake River chinook salmon as a threatened species, the Forest Service and the NMFS entered into an "Inter-agency Agreement for Fulfilling Section 7 Interagency Coordination Responsibilities under the Endangered Species Act, Snake River Basin Salmonid Habitats." They agreed to cooperate in developing and implementing conservation strategies for the listed salmon and to consider amending LRMPs that were inconsistent with these strategies. In addition, the Forest Service agreed to conduct a biological evaluation of all proposed and ongoing activities in the Wallowa-Whitman and Umatilla Forests.

On April 22, 1992, the NMFS listed the Snake River chinook as a threatened species. *See* 57 Fed.Reg. 14,653. After the salmon were listed, 755 ongoing projects for the Umatilla Forest and 2,806 for the Wallowa-Whitman Forest were subjected to a biological evaluation to determine whether particular activities might affect the salmon.[2] Over 700 projects

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[2] The evaluation process is summarized as follows:

> When the [Forest Service] biologist completes the biological evaluation process, a determination is made of "no effect" or "may effect" on the listed species. If a

were found "likely to adversely affect" the salmon. All of these were suspended pending completion of formal consultation with the NMFS.[3] Just under 1,200 of the projects were found not to affect the salmon. Another 1,700 projects were found "not likely to adversely affect" the salmon. All of the "not likely to adversely affect" projects were submitted to the NMFS for informal consultation by the end of August 1992.[4] However, the Forest Service decided to allow on-going projects to continue during the duration of the informal consultation where it previously determined that the project was not likely to adversely affect the salmon. It determined that projects it deems are "not likely to adversely affect" a species will not constitute "irreversible or irretrievable commitments of resources and can be continued."

On August 5, PRC sent the Forest Service a 60-day notice of intent to sue under the ESA, citing the agency's failure to consult with the NMFS on the effects on the Snake River chinook of the Umatilla and Wallowa-Whitman National Forest LRMPs. On

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"may effect" determination is made, the biologist then makes an additional determination of "beneficial affect [sic]," "not likely to adversely affect" (NLAA), or "likely to adversely affect" (LAA). All "may effect" determinations trigger the Section 7 consultation requirement of the ESA.

[3] Thirty of these actions were eventually downgraded to "not likely to adversely affect" because of modifications. These actions were not suspended.

[4] However, in January 1993, the Forest Service and the NMFS agreed in a "Standardized Outline for On-Going and Proposed Projects—Section 7 Consultation" to submit all actions for formal consultation. The change from informal to formal consultation did not change the initial determinations made in the biological evaluations.

October 26, 1992, PRC filed suit in federal district court in Oregon alleging that the Forest Service violated the ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2). PRC moved for partial summary judgment, seeking a declaration that the Forest Service is violating ESA § 7(a)(2) and an order compelling the Forest Service to initiate consultation with NMFS on the Umatilla and Wallowa-Whitman LRMPs.[5] In addition, PRC moved for a preliminary or permanent injunction, requesting that the district court enjoin all ongoing and future activities in the two national forests that may affect the threatened chinook until the Forest Service completes consultation on the LRMPs.[6]

The district court granted PRC's motion for summary judgment and ordered the Forest Service to perform a biological assessment of the LRMPs and consult with NMFS as required by the ESA. The court also enjoined the Forest Service "from announcing, awarding or conducting any additional timber sales, range activities/grazing permits, or road building projects pending compliance with ESA § 7." The injunction covered all future activities that "fall within the definition of a § 7(d) [16 U.S.C. § 1536(d)] [as an] irreversible or irretrievable commitment of a resource during the consultation period."

However, the court refused to enjoin any of the ongoing or announced timber, range, and road

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[5] The Forest Service also filed a cross-motion for summary judgment.

[6] After PRC submitted a list of the activities it sought to enjoin, the Forest Service admitted that it had already completed twenty of the identified timber sales and ten of the identified road projects. These projects were undertaken without consultation with the NMFS.

projects under the LRMPs because it found that PRC had not adequately contested the Forest Service's determination that these activities were not irreversible or irretrievable commitments of resources under § 7(d). The district court denied PRC's motion for reconsideration of the scope of the injunction or for an injunction pending appeal. These appeals followed.

I

The Forest Service first argues that the district court erred in concluding that the LRMPs are agency actions under § 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2).[7] Specifically, the Forest Service argues that the LRMPs are not ongoing agency action throughout their duration, but only when they were adopted in 1990 or if they are revised or amended in the future. The Forest Service maintains that the district court erred in determining that the LRMPs represent ongoing agency action throughout their duration.

This argument is incorrect. The LRMPs are comprehensive management plans governing a multitude of individual projects. Indeed, every individual project planned in both national forests involved in this case is implemented according to the LRMPs. Thus, because the LRMPs have an ongoing and long-lasting effect even after adoption, we hold that the LRMPs represent ongoing agency action. We affirm the district court's decision requiring the Forest Service to consult with the NMFS as required under the ESA, 16 U.S.C. § 1536(a)(2).

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[7] Although the Forest Service sought to dismiss PRC's complaint on mootness and standing grounds, it does not challenge on appeal the district court's resolution of these issues.

The Forest Service contends that the courts should defer to its administration of an ambiguous statute. It argues that the LRMPs in this case are not agency action and that its interpretation of the ESA is reasonable. It cites *Udall v. Tallman*, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965) for this very proposition. In *Udall*, the Court stated: "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." *Id.* at 16, 85 S.Ct. at 801.

However, *Udall* does not mandate deference here. In *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 447-48, 107 S.Ct. 1207, 1221-22, 94 L.Ed.2d 434 (1987), the Court made it plain that

> [t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect. (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, n. 9 [104 S.Ct. 2778, 2782, n. 9, 81 L.Ed.2d 694] (1984)). *Accord Central Montana Elec. Power Coop. v. Administrator of Bonneville Power Admin.*, 840 F.2d 1472, 1477 (9th Cir.1988).

Thus, when Congress's intent is clear, the courts, not the agency, are charged with the basic responsibility for statutory interpretation. A contrary agency interpretation is entitled to no deference. And as the Supreme Court emphasized in *TVA v. Hill*, 437 U.S. 153, 173, 98 S.Ct. 2279, 2291, 57 L.Ed.2d

117 (1978), "one would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the [ESA]." The ESA's plain language affirmatively commands all federal agencies to "insure that *any action* authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species...." 16 U.S.C. § 1536(a)(2) (emphasis added).[8] "This language admits of no exception." *TVA*, 437

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[8] In order to ensure compliance with the Act, the ESA and its implementing regulations require federal agencies ("action agencies") to consult with the appropriate federal fish and wildlife agency—NMFS, in this case—whenever their actions "may affect" an endangered or threatened species. *See* 50 C.F.R. § 402.14(a). Thus, if the agency determines that a particular action will have no effect on an endangered or threatened species, the consultation requirements are not triggered.

If the action agency subsequently determines that its action is "likely to adversely affect" a protected species, it must engage in formal consultation. *Id.* Formal consultation requires that the consulting agency—again, NMFS—issue a biological opinion determining whether the action is likely to jeopardize the listed species and describing, if necessary, reasonable and prudent alternatives that will avoid a likelihood of jeopardy. *See* 16 U.S.C. § 1535(b)(3)(A).

But if the action agency determines that an action is "not likely to adversely affect" the species, it may attempt informal consultation. *See* 50 C.F.R. § 402.13(a). This does not end the consultation process. The consulting agency must issue a written concurrence in the determination or may suggest modifications that the action agency could take to avoid the likelihood of adverse effects to the listed species. *See* 50 C.F.R. § 402.13(b). If no such concurrence is reached, the regulations require that formal consultation be undertaken. *See* 50 C.F.R. § 402.14.

U.S. at 173, 98 S.Ct. at 2291.[9] The regulations defining agency action also admit of no limitations:

> *Action* means *all* activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, *but are not limited to*:
>
> (a) actions intended to conserve listed species or their habitat;
>
> (b) the promulgation of regulations;
>
> (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or
>
> (d) actions directly or indirectly causing modifications to the land, water, or air.
>
> 50 C.F.R. § 402.02 (emphasis added).

In short, there is little doubt that Congress intended to enact a broad definition of agency action in the ESA, and therefore that the LRMPs are continuing agency action. Indeed, the Supreme Court has interpreted the plain meaning of agency action broadly, in conformance with Congress's clear intent, in a case that presents striking similarities to this case. In *TVA v. Hill*, the Court rejected the Tennessee Valley Authority's contention that the ESA did not apply to a federal project (a $102 million dollar dam) that was well under way when Congress passed the ESA in 1973. *TVA*, 437 U.S. at 173, 98 S.Ct. at 2291. The Court noted that "[t]o sustain [this] position ... we would be forced to ignore the

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[9] Subsequent to the *TVA* decision, Congress amended the ESA to allow exceptions to the requirements of § 7(a)(2) in extraordinary circumstances, none of which apply here. *See* 16 U.S.C. § 1536(h).

ordinary meaning of [the] plain language [in § 7(a)(2)]." *Id.* Although the dam had been planned and approved years before the passage of the ESA, the Court found that TVA's operation of the dam constituted agency action, and it enjoined the dam's operation.[10] *Id.* The Court recognized that its reading of the ESA would produce results requiring the sacrifice of many millions of dollars in public funds. But it asserted that "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as 'institutionalized caution.'" *Id.* at 194, 98 S.Ct. at 2302.

In this action, the Forest Service makes essentially the same argument—that the ESA does not apply to programs or activities undertaken before the listing of a species. It argues that it is not required to reinitiate consultation because the LRMPs are not continuing agency actions, but are agency actions only at the time they are adopted, revised, or amended. It further maintains that the existence of the LRMPs by themselves are not agency actions. Rather, only the specific activities authorized by the LRMPs are agency actions within the meaning of the ESA. The LRMPs themselves, the Service argues, do not mandate any action and are "merely" programmatic documents.

However, the Forest Service can cite no precedent of this or any other court which lends support to such a reading of the statute. And as shown above, *TVA* weighs heavily against the Forest Service on this

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[10] It was accepted by both parties in *TVA* that the dam's proposed operation would have eradicated the snail darter, an endangered species.

point, as is evident from the *TVA* Court's observation that "Congress foresaw that § 7 would, on occasion, require agencies to alter ongoing projects in order to fulfill the goals of the Act." *Id.* at 186, 98 S.Ct. at 2298.

Following the Supreme Court's lead in *TVA*, we have also construed "agency action" broadly. *See Lane County Audubon Soc'y v. Jamison*, 958 F.2d 290, 294 (9th Cir.1992); *Conner v. Burford*, 848 F.2d 1441, 1452 (9th Cir.1988), *cert. denied*, 489 U.S. 1012, 109 S.Ct. 1121, 103 L.Ed.2d 184 (1989). More importantly, we have recognized that forest management plans have ongoing effects extending beyond their mere approval. In *Lane County*, we found that a forest management plan implemented without consultation violated the ESA. Although the management plan in that case was implemented *after* the listing of the threatened species, our reasoning is relevant. We stated that the "[forest management plan] is action that 'may affect' the spotted owl, since it sets forth criteria for harvesting owl habitat." *Lane County*, 958 F.2d at 294. Thus, we implicitly recognized that forest management plans can be actions even after their implementation.

Similarly, the LRMPs are actions that "may affect" the protected salmon because the plans set forth criteria for harvesting resources within the salmon's habitat. Among its zoning decisions, the Wallowa-Whitman LRMP allocates approximately 60,000 acres to the "management area" that surrounds the spawning grounds of the Snake River chinook. This allocation, established *before* the Snake River chinook were listed as threatened, sets guidelines for logging, grazing and road-building activities within its boundaries. Furthermore, the plans establish the allowable sale quantity of timber

as well as production targets and schedules for forage, road construction, and other economic commodities.[11]

Perhaps most telling, the Forest Service and the NMFS are amending the LRMPs, admitting that they are inadequate because they do not address the newly listed species.[12] These amendments belie the Forest Service's claim that the LRMPs do not constitute continuing agency action. They expressly acknowledge the need to revisit the LRMPs in light of the salmon's listing as a threatened species.

Given the importance of the LRMPs in establishing resource and land use policies for the forests in question there is little doubt that they are continuing agency action under § 7(a)(2) of the ESA. The fact that the Forest Service adopted these LRMPs before the listing of the Snake River chinook is, therefore, irrelevant. We affirm the district court's order requiring the Forest Service to reinitiate consultation under § 7(a)(2).

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[11] The Wallowa-Whitman LRMP includes a "Ten-Year Timber Sale Action Plan" that outlines "how the timber outputs ... are likely to be provided during the first ten years of plan implementation" and a more detailed five-year plan that displays each sale's name, location, volume, and road requirements.

[12] The Forest Service claims that reinitiation of consultation would be superfluous and unnecessary because it is in consultation regarding the proposed amendments currently under consideration. However, consultation on the entirety of both LRMPs is required, not just an amendment to the LRMPs. *Cf. Conner v. Burford*, 848 F.2d at 1453 (9th Cir.1988) ("[T]he ESA requires the [agency's] biological opinion to analyze the effect of the *entire* agency action.") Requiring the Forest Service to reinitiate consultation is not superfluous.

II

The district court accepted the Forest Service's conclusion that ongoing and announced timber, range, and road projects that may affect the Snake River chinook were not irreversible or irretrievable commitments of resources under § 7(d) of the ESA. 16 U.S.C. § 1536(d). It refused to enjoin these activities while the Forest Service consulted with NMFS on the individual projects in the LRMPs. However, the district court erred in applying § 7(d) to the instant case. As the ESA's plain language makes clear, § 7(d) applies only after an agency has initiated consultation under § 7(a)(2).[13] As detailed above, the Forest Service has, as yet, failed to enter into consultation on the *LRMPs themselves*, despite the fact that the LRMPs constitute continuing agency action under § 7(a)(2). Accordingly, we reverse the district court's judgment denying an injunction barring ongoing and announced projects that may affect the Snake River chinook.

We have previously made it clear that § 7(d) does not serve as a basis for *any* governmental action unless and until consultation has been initiated. In *Conner*, we found that the Fish and Wildlife Service had violated the ESA by failing to consider the consequences of all stages of oil and gas leases on

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[13] Section 7(d) states:

> *After initiation of consultation required under [§ 7(a)(2)]*, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate [§ 7(a)(2)].

16 U.S.C. § 1536(d) (emphasis added).

certain threatened or endangered species in its biological opinion: *Conner*, 848 F.2d at 1455 n. 34. We rejected the Fish and Wildlife Service's suggestion that projects it unilaterally determined were not irreversible and irretrievable commitments of resources could go forward even though it had not obtained an adequate biological opinion as required by § 7(a)(2). *Id.*[14]

The Forest Service has not reinitiated consultation as required under § 7(a)(2). Thus, its determination that the timber, road, and range projects are not irreversible or irretrievable commitments of resources is of no moment. Section 7(a)(2) mandates that the Forest Service enter into consultation on the LRMPs. Its conclusion that these activities "may affect" the protected salmon is sufficient reason to enjoin these projects. Only after the Forest Service complies with § 7(a)(2) can any activity that may affect the protected salmon go forward.[15] Accordingly, we reverse the district court's denial of an injunction barring all ongoing and announced activities that may affect the Snake River chinook from going forward. The Forest Service

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[14] In *Conner*, we stated that

> Section 7(d) does not amend section 7(a) to read that a biological opinion is not required before the initiation of agency action so long as there is no irreversible or irretrievable commitment of resources. . . . Rather, section 7(d) clarifies the requirements of Section 7(a), ensuring that the status quo will be maintained during the consultation process. Section 7(d) is not an independent authorization for "incremental step consultation." *Conner*, 848 F.2d at 1455 n. 4.

[15] Of course, the activity cannot go forward even after consultation is initiated if it represents an irreversible and irretrievable commitment of resources as prohibited by § 7(d).

cannot go forward with these activities without first complying with the consultation requirements of the ESA.

Because § 7(d) could not serve as the basis for permitting *any* agency action at the time of the hearing, we need not address the district court's rulings on whether the various commitments of resources were irreversible and irretrievable. If the Forest Service initiates consultation on the LRMPs, the court must decide if the ongoing or announced activities can proceed during the consultation period. It may find guidance in *Lane County*, where we held that the Bureau of Land Management could not go forward with any new sales of timber until consultation on a forest management plan and its effect on the threatened species was completed. Most importantly, we held that timber sales constitute *per se* irreversible and irretrievable commitments of resources under § 7(d) and thus could not go forward during the consultation period. *Lane County*, 958 F.2d at 295.[16]

CONCLUSION

We AFFIRM the district court's judgment granting an injunction against the Forest Service pending compliance with the ESA and hold that the Land and Resource Management Plans constitute continuing agency action requiring consultation under § 7(a)(2) of the ESA. We REVERSE the

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[16] *See also Commonwealth of Mass. v. Andrus*, 481 F.Supp. 685, 691 (D.Mass.1979) (drilling an irretrievable or irreversible commitment) (citing *Nebraska v. Rural Electrification Admin.*, 12 ERC 1156, 1172, 1978 WL 23470 (construction an irretrievable or irreversible commitment)), *aff'd sub nom. Conservation Law Found. of New England, Inc. v. Andrus*, 623 F.2d 712 (1st Cir.1979).

district court's judgment excluding from the injunction ongoing and announced timber, range, and road projects. The district court erred in relying on § 7(d) of the ESA at a time when the Forest Service had failed to enter into consultation as required by § 7(a)(2) of that statute. We REMAND to the district court to modify its injunction to include the ongoing and announced timber, range and road projects. This shall not preclude the district court from considering further modifications to its injunction, in accordance with our opinion, if and when consultation is reinitiated.

AFFIRMED in part, REVERSED in part, and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civ. No. 92-1322-MA

PACIFIC RIVERS COUNCIL, ET AL., PLAINTIFFS

v.

F. DALE ROBERTSON, ET AL., DEFENDANTS

Oct. 25, 1993

AMENDED OPINION

Before: MARSH, District Judge.

On October 21, 1993, the parties filed a joint motion for clarification of my opinion issued on October 6, 1993. The motion is GRANTED and my amended opinion follows.

Plaintiffs filed this action against defendants seeking declaratory and injunctive relief on grounds that the Forest Service (USFS) has violated the Endangered Species Act (ESA) by failing to engage in § 7 consultations with the NMFS on two Land Resource Management Plans (LRMPs)[1] for the

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[1] The parties use the terms "LRMPs" and "forest plans" interchangeably.

Wallowa-Whitman and Umatilla forests regarding effects of the LRMPs on threatened Snake River chinook salmon. The forest plans were adopted in 1990, the salmon were listed in 1992. Plaintiffs assert three claims for relief against the USFS: (1) violation of the ESA and APA by failing to consult with NMFS over the Wallowa-Whitman and Umatilla LRMPs; (2) violation of the ESA and APA by failing to ensure that adoption and implementation of the Umatilla and Wallowa-Whitman LRMPs are not likely to jeopardize the species; and (3) violation of ESA § 9 and the APA by "taking" listed species without an incidental take permit.

Plaintiffs now move for partial summary judgment on their first claim seeking an injunction against the continuation of all activity which has been identified by the forest service as activity which "may affect" listed salmon species. Defendants and defendants-intervenors (hereinafter "defendants," except where noted) have filed cross-motions for summary judgment or for dismissal on 5 grounds: (1) plaintiffs lack standing; (2) failure to state a claim; (3) failure to exhaust administrative remedies; (4) the LRMPs are not "agency actions" for which ESA consultation is required; and (5) mootness—that consultations on "anticipated" amendments are underway.

On July 12, 1993, during oral argument on the motions, I directed several questions to the parties regarding: (1) the scope of plaintiffs' requested relief and what activity they *specifically* sought to stay by injunction; (2) what practical effect compliance with the ESA would have on the LRMP beyond ESA compliance on site-specific activities and anticipated "conservation strategies" for listed chinook; (3) the scope, purpose and actual in-practice use of the LRMPs by the Forest Service; and (4) what the

Forest Service is actually doing now and under what time-line.

Plaintiffs and defendants submitted supplemental briefs and responses pursuant to my requests and both did an excellent job of providing direct, concise responses to my questions for more background information. In addition, the parties submitted a copy of the entire Wallowa-Whitman LRMP and the biological opinion prepared for the Tucannon River Subbasin which have aided my understanding of the issues.[2]

Discussion

a. *Standing*

Section 11 of the ESA, 16 U.S.C. § 1540(g), provides that "any person" may maintain an action against another person, or against a government entity, for violations of the ESA.[3] Parties seeking to invoke federal jurisdiction under the ESA must allege the following: (1) an injury in fact; (2) a causal connection between the injury and the challenged action; and (3) that the injury is likely to be redressed by the relief sought. *Lujan v. Defenders of Wildlife*, — U.S. —, —, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992).

Plaintiffs are five non-profit organizations interested in monitoring and protecting public lands,

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[2] For further background on the historical development of land and resource planning in the U.S., *see* Charles Wilkinson and Michael Anderson, *Land and Resource Planning in the National Forests*, 64 Or.L.Rev. 1 (1985).

[3] The ESA defines "person" to include any "individual, corporation, partnership, trust, association or any other private entity," or government or municipal entity. § 1532(13).

waters and wildlife. Plaintiffs claim that their members "derive recreational, scientific and aesthetic benefit" from the existence of listed Snake River chinook through observation, study and recreational fishing within the Umatilla and Wallowa-Whitman National Forests.[4] Plaintiffs contend that their interests in the listed species have been adversely affected by defendants' failure to consult on the impacts of the LRMPs on the listed species.

Defendants have no dispute with plaintiffs' interest in the listed species in the Wallowa-Whitman and Umatilla forests,[5] but contend that plaintiffs have failed to allege facts sufficient to show "causation" and "redressability,"—i.e. if the plaintiffs' requested relief is ordered, it will have no impact on the listed species because of the broad programmatic nature of the LRMPs.

The heart of defendants' challenge to plaintiffs' standing relates to the underlying merits of plaintiffs' claim. Plaintiffs have countered these arguments by proffering declarations from Jonathan Rhodes, an hydrologist with the Columbia River Inter-Tribal Fish Commission (CRITFC), and Dale McCullough, a fishery scientist with CRITFC.

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[4] Plaintiffs have submitted affidavits from Ric Bailey, Executive Director of plaintiff Hells Canyon Preservation Council, Dan Wadosky, a member of plaintiff Oregon Natural Desert Association, and Tim Lillebo, a member and staff person for plaintiff Oregon Natural Resources Council.

[5] Declarations by organization members who have used and will continue to use forests are generally sufficient to satisfy "injury-in-fact," the first element of standing. *Mt. Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1581-82 (9th Cir.1993); *see also Portland Audubon Society v. Babbitt*, 998 F.2d 705, 707-08 (9th Cir.1993) (NEPA standing).

Supported by these declarations, plaintiffs contend that the standards and guidelines in the LRMP are either "too vague" to provide sufficient direction to protect listed chinook habitat, ignore essential aspects of listed salmon habitat, and, where the LRMPs provide specific minimum guidelines (such as to 100 foot riparian "buffer zone"), such guidelines are an inappropriate "floor" to adequately sustain the habitat of the listed species. Further, plaintiffs contend that site-specific consultations would fail to ameliorate potential harm because, in part, such consultations fail to adequately consider long-range future effects and have a relatively narrow geographic focus.

The Ninth Circuit has rejected similar arguments by government defendants regarding the "nexus" required between an alleged procedural violation in the adoption of a management program and harm which could flow from actions authorized under a program. *See Seattle Audubon Society v. Espy*, 998 F.2d 699, 703 (9th Cir.1993) (allegation that interagency strategy failed to consider new information about spotted owl in violation of NEPA and NFMA constituted sufficient "harm" to group's interest in owl to satisfy standing causation requirement); *Portland Audubon*, 998 F.2d at 708 (standing under NEPA established since Timber Management Plans "necessarily drive the location and volume" of decisions which "culminate" in timber sales); *see also Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1515 (9th Cir.1992) (that potential injury may result from chain of events does not doom standing, otherwise programmatic authorization could escape review). Thus, while defendants are technically correct that an LRMP itself should have no direct impact upon listed salmon,

actions authorized under an LRMP—such as timber harvesting or grazing—may adversely affect the species.

For the limited purpose of establishing standing, I find that the declarations of plaintiffs' members adequately support the existence of an "injury-in-fact," and that the three declarations of Jonathan Rhodes, and portions of the declarations of Dale McCullough adequately allege causation—that the Forest Service's failure to initiate § 7 consultation procedures with respect to the LRMPs may harm listed species, and redressability—that compliance with the ESA may ameliorate such harm.[6]

b. *The LRMPs*

(1) *What is an LRMP?*

Under National Forest Management Act, 16 U.S.C. § 1604 (NFMA), the USFS is directed to prepare land

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[6] Government defendants' argument about exhaustion of administrative remedies was premised upon an erroneous assumption that plaintiffs were seeking to compel the Forest Service to revise or amend the LRMPs under the NFMA regulations, 36 C.F.R. 219.10(f) & (g). In their supplemental memoranda, plaintiffs have unequivocally stated that they do *not* seek amendment of the LRMPs—only consultation under § 7 of the ESA which may or may not ultimately lead to LRMP amendments or revision. Defendants do not contend that the ESA requires exhaustion.

Even if exhaustion was required, however, I find that the letters of September 28, 1992 and December 8, 1992 between John Lowe, the Pacific Northwest Regional Forester, and Rolland Schmitten, Regional Director of the NMFS demonstrate that further administrative relief would have been futile. *See Fraley v. Bureau of Prisons*, 1 F.3d 924, 925 (9th Cir.1993) (exhaustion not required in face of official policy and notice of intent to comply with such policy).

and resource management plans for individual units of the national forest system which serve as guides to the agency's management for 10-15 years. 16 U.S.C. § 1604(f)(5). A forest plan must provide for multiple use and sustained yield of goods and services from the national forest maximizing long term net public benefits in an environmentally sound manner; meet specified requirements covering a wide-range of forest resources and activities including wildlife; provide adequate fish and wildlife habitat to maintain viable populations of existing native vertebrate species; and "include measures for preventing the destruction or adverse modification of critical habitat for threatened and endangered species." 36 C.F.R. 219.1(a); 219.27(6) & (8); *see also* Wallowa-Whitman LRMP, 2-9. The USFS is directed to select "management indicator species (MIS)," which may or may not be listed species, and thereafter set objectives within the forest plans for maintaining and/or improving MIS habitats. 36 C.F.R. § 219.19(a) and 219.20. Every resource plan, permit, contract, or any other document pertaining to the use of the forest must be consistent with the Forest Plan. 16 U.S.C. § 1604(i).

The LRMPs at issue in this case are designed to "guide all natural resource management standards and guidelines," for the Umatilla and Wallowa-Whitman National Forests "for the next 10 to 15 years." The Wallowa-Whitman LRMP was approved on April 23, 1990 and the Umatilla LRMP was approved on June 11, 1990—approximately 2 years prior to the listing of the Snake River chinook salmon. The plans include multiple use goals, activity management and maximum forest-wide

allowable timber sale quantity—"ASQ."[7] The "Management Goals" section notes social and economic needs and a desire to generally preserve, protect and enhance "values of the forest's wilderness" and to "double" anadromous fish runs in the Columbia River Basin by the year 2000.

The LRMP section entitled "Forest-wide Standards and Guidelines" covers a broad range of areas including cultural resources, soil quality, recreation, and timber and range management. Anadromous fish and fish habitat are addressed in sections covering watersheds, threatened, endangered and sensitive species and wildlife. The MIS for riparian and aquatic habitats within the Wallowa-Whitman forest only relate to steelhead and resident trout. The watershed section lists 32 standards and guidelines including priority for fish habitat, cooperation and compliance with state agencies and water quality regulations, a 100 foot no timber harvest zone aside class I and II streams,[8] temperature stability goals for class I and II streams, cumulative effects analysis and monitoring, recommendations regarding limitations on heavy

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[7] Specific ASQ levels are addressed in the accompanying EISs prepared by the USFS. "ASQ" or "allowable sale quantity" is defined as the "upper limit of harvestable wood to be sold from suitable forest land during the first decade of the planning period" and is usually expressed as an annual average ASQ. Timber Sale Program Quantity "TSPQ," is the volume of timber planned for the decade and includes ASQ along with additional material planned for sale. In the Wallowa-Whitman LRMP, TSPQ is 207 MMBF and ASQ is 141 MMBF.

[8] The LRMP sets forth four stream classifications in descending priority. Class I streams provide water for domestic use or are used by large numbers of fish for spawning, rearing or migration. *See* Wallowa-Whitman LRMP Glossary, at 45.

equipment use and mining activities near riparian zones, and restricting livestock grazing in municipal watersheds to recreation pack stock. The endangered species section essentially directs compliance with the ESA by requiring biological evaluations for each proposed project as well as cooperation with other state and federal agencies, data collection and monitoring. The wildlife section provides several guidelines for riparian zone management including 60-100% stream shade on live streams, and specific streamside sediment and stability goals.

Defendants do not contend that steelhead or resident trout constitute adequate "indicator" species to protect listed chinook. However, since the adoption of the LRMPs, the Forest Service has considered the listed chinook on a policy-level basis. The "white paper" prepared by Rick Roberts'[9] staff following implementation of the Forest Plan Adjustment Strategy (FPAS), looked at current standards and guidelines for fish, water quality and riparian areas in light of recent ESA listings of Snake River chinook and other listing petitions and recommended "more in depth discussion of federally listed species Recovery Plan objectives in the LRMP's (sic)" with reliance upon "project-level" environmental analysis in the interim. In addition, the USFS entered into an inter-agency cooperative agreement with the NMFS for the express purpose of implementing Forest Plans to be consistent with the ESA. In a directive issued by John Lowe to Forest Supervisors and Directors on September 2, 1992, he notes that, in conducting the FPAS to evaluate the need for changes in the Forest Plan, several studies

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[9] Rick Roberts is the designated ESA coordinator for the National Forests in Region 6.

of forest health and anadromous fish habitat management "which may significantly affect Forest Plan analysis and standards and guidelines are now in progress." This interagency agreement contemplates the adoption of "conservation strategies," the preparation of biological opinions and biological evaluations on all projects that "may affect" listed species. Thus, the USFS acknowledges that there may be a need for change or amendment of some kind in the LRMP to further address anadromous fish habitat.

An example of this continuing evaluation is found in the Upper Grande Ronde River Subdrainage Proposed Conservation Strategy ("UGR Strategy"), which is the first and, at this time, only conservation strategy completed for the Wallowa-Whitman forest. Roberts describes this strategy as the "prototype" which is "now going through the decision making process as an amendment to the Wallowa-Whitman LRMP." The need for such a plan is vividly demonstrated in the UGR Strategy. First, it provides a bleak outlook on current anadromous fish habitat conditions (80% deteriorated conditions with only 24 adult spring/summer chinook returning in 1992), and then proposes active floodplain management through canopy closures of 40-75%, streamside shading of 80%, and increasing riparian zone groundcover to 90%.

(2) *The Issues*

The complaint and defenses in this case raise three central and interrelated issues: (1) Is an LRMP an agency action? and (2) If so, is it the *type* of agency action which requires ESA consultation? and (3) If not, is the USFS currently complying with the ESA by consulting on site-specific issues only and by

creating an interagency cooperative agreement with NMFS?

Government defendants argue that they have complied with the ESA by adopting a "Forest Plan Adjustment Strategy," (FPAS) and an "inter-Agency Agreement" between the USFS and NMFS. In a nutshell, the Forest Service determined that the best way to address forest management following the salmon listings was to leave the LRMPs as-is and, instead, conduct consultations on a site and activity specific basis.[10] The USFS would do this by organizing the two areas into 11 discrete "watersheds" and by establishing a coordination agreement with NMFS for site-specific activities. John Lowe, the Regional Forester, summarizes the defendants' position in his September 18, 1992 letter to Rolland Schmitten, Regional Director for NMFS:

> "the LRMP's (sic) provide program direction to the Forests. The environmental impact statements (EIS) developed for each of the LRMP's addressed the potential effects of implementing programs rather than site specific issues. The nature of a programmatic EIS does not allow for an analysis that would provide a substantive discussion relative to potential effects to a given population of salmon. Projects developed under the direction of the LRMP's require additional NEPA analysis that address site-specific effects. The LRMP's (sic) as well as Forest Service

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[10] For example, according to Rick Roberts, the designated ESA coordinator for the National Forests in Region 6, the Wallowa-Whitman National Forest submitted biological evaluations for 11 timber sales between July and November of 1992 to NMFS. On June 9, 1993, NMFS issued a biological opinion that the proposed sales were "not likely to jeopardize the continued existence" of the listed salmon.

> direction, require that all projects comply with the ESA and be evaluated with the threatened and endangered species in mind. The Forests are currently consulting with the NMFS on those proposed projects that have the potential to affect listed salmon."

Schmitten agreed with this assessment as set forth in his written response of December 8, 1992: "Informal consultation on these LRMPs would not be constructive or necessary under the ESA at this time." Schmitten notes, however, that, if conservation strategies developed under the Inter-Agency agreement conflict with LRMPs standards or guidelines, the USFS agreed to consider amending the LRMPs.

c. Where does the ESA fit in?

(1) *The Law*

The Endangered Species Act, 16 U.S.C. § 1531, *et seq.*, was enacted by Congress in 1973 to conserve endangered and threatened species. The 1973 Act eliminated the proviso from prior acts that endangered species be protected "where practicable" and directed instead that the "balance [be] struck in favor of affording endangered species the highest of priorities." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 180-181, 195, 98 S.Ct. 2279, 2294-2295, 2302, 57 L.Ed.2d 117 (1978); *see also Sierra Club v. Marsh*, 816 F.2d 1376, 1383 (9th Cir.1987) (noting that ESA significantly restricts court's equity jurisdiction).

Section 7 of the ESA imposes both substantive and procedural requirements upon federal agencies. Section 7(a) requires that agencies "insure that any action authorized, funded or carried out by such agency . . . is not likely to jeopardize the continued

existence of any endangered or threatened species." § 1536(a)(2). This general proscription covers direct threats to species as well as destruction or adverse modifications to "critical" habitat. *Id.* "Agency action" is broadly defined in the regulations to include "all activities or programs of any kind" including:

> "(a) actions intended to conserve listed species or their habitat; [or]
>
> * * * * * *
>
> "(d) actions directly or indirectly causing modifications to the land, water or air."

50 C.F.R. 402.02.

Sections 7(b) & (c) prescribe a three-step process which includes an initial screening to determine if an endangered species "may be present," and a biological assessment to determine if the present species is "likely to be affected." If the biological assessment determines that an action "may affect" a listed species, the Act requires the action agency to engage in "formal consultation" with the U.S. Fish and Wildlife Service (FWS) or NMFS. Following formal consultation, the FWS or NMFS issues a "biological opinion" evaluating the nature and extent of jeopardy posed to the listed species by the agency action and, if jeopardy is found, suggesting reasonable and prudent alternatives to avoid jeopardy. 15 U.S.C. § 1536(b); *Thomas v. Peterson*, 753 F.2d 754, 763 (9th Cir.1985). After initiation of consultation under the ESA, section 7(d) requires the maintenance of the status quo by directing that the action agency "shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent

alternative measures." *See Lane County Audubon*, 958 F.2d at 294 (§ 7(d) designed to maintain status quo pending consultation).

(2) *The Regulations*

Regulations promulgated under § 7 of the ESA further refine the 3-step consultation process. As stated above, the action agency makes a biological assessment in the screening process in order to determine if a pending action is likely to affect a listed species that is present. Under the regulations and practices of the USFS, the agency's biological evaluation may result in one of two findings: "no effect" or "may affect."[11] A conclusion of "no effect," if carefully documented, requires no consultation.

If an action is classified as a "may affect," it undergoes a further level of classification: beneficial affect, not likely to adversely affect, or likely to adversely affect. *Id.* As an alternative to a biological assessment, regulation 402.13 would imply that the

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[11] Rick Roberts describes the USFS' biological evaluation process in his second declaration, at paragraphs 6 & 7. The "process" is conducted by a USFS biologist who reviews the proposed action and examines any impacts of potential effects on listed species.

NFRC argued that the USFS "has determined that the plans ... do not affect listed species or critical habitat," citing John Lowe's letter to Rolland Schmitten of September 28, 1992. To the extent NFRC attempts to argue that this satisfied the first stage of an ESA consultation, I disagree for two reasons. First, John Lowe is identified as a regional forester, not a biologist. Second, Lowe claims that the USFS will not consult on the LRMPs because they are programmatic documents not amenable to consultation analysis—not because the USFS has reviewed the LRMP and determined that it would have no effect on the listed species.

action agency may undergo informal consultation to determine if the action is likely to adversely affect a listed species. In either event, if the action is found to be one which "may affect" (likely to or not likely to adversely affect) a listed species, the NMFS may "suggest modifications" to the proposed action to further "avoid the likelihood of adverse effects" upon listed species or their habitat. § 402.13. Actions classified either in a biological assessment or informal consultation process as "likely to adversely affect" must undergo formal consultation with NMFS. § 402.14.

According to Rick Roberts, all site specific actions within the LRMPs and in areas in which the species may be present are undergoing formal consultation which will result in the production of either a biological assessment (produced by the USFS) or a biological opinion (produced by NMFS). Roberts also indicates that *during* the consultation process, only those actions classified as "beneficial affect" or "not likely to adversely affect" are permitted to continue because "they have been found not to make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measure which may be generated in the formal consultation process." *See also* Exhibit 9 to the Declaration of John Lowe ("[O]ngoing range allotments that are determined likely to adversely affect will not be allowed to continue in 1993.").

(3) *Application of the Law and Regulations to LRMPs*

There is no dispute that listed chinook species and listed chinook habitat are present in the Wallowa-Whitman and Umatilla forests and, thus, the protection of the ESA, one of the "most comprehensive legislation for the preservation of the endangered species ever enacted" *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 180, 98 S.Ct. 2279, 2294, 57 L.Ed.2d 117 (1978), is applicable to these geographic areas. There is also no question that forest "habitat" management is one of the critical factors of the overall program needed to protect the listed chinook. *See* generally, *Pacific Northwest Generating Cooperative v. Brown*, 822 F.Supp. 1479 (D.Or.1993).

In addition to the general ESA principles discussed, *infra*, the legal analysis in this case centers upon three decisions which provide some spectral parameters: *Lane County Audubon*, *Swan View*, and *Conner v. Burford*.

In *Lane County Audubon Society v. Jamison*, 958 F.2d 290, 293 (9th Cir.1992), the court addressed the issue of whether the Jamison Strategy was an agency action which required the BLM to consult with the FWS pursuant to ESA § 7 prior to implementation. The Jamison Strategy was a document created in response to the listing of the Northern Spotted Owl which provided 1991 and 1992 timber sale management guidelines within BLM forests in Washington, Oregon and California. The court held that the Jamison Strategy was an "agency action" which required ESA consultation prior to implementation. I have reviewed the Jamison Strategy and, much like sections within the LRMPs in this case, it merely provided broad, general, programmatic guidance to

the BLM regarding where not to harvest timber to protect the Spotted Owl while meeting a program goal of 750 MMBF. The court specifically rejected the BLM's argument that the strategy constituted a mere "policy statement" and found that, in implementing the strategy through the adoption of individual sale programs prior to engaging in consultation with the Fish and Wildlife Service, the BLM had violated the ESA even though the BLM *had* consulted with the FWS on individual sales. *Id.*, at 293-94.

Defendants rely primarily upon *Swan View Coalition v. Turner*, 824 F.Supp. 923 (D.Mont.1992) for the propositions that: (1) the "mere continued existence" of an LRMP and the listing of an endangered species subsequent to the adoption of an LRMP does not require ESA consultation or adoption or amendment to an LRMP and; (2) that purely programmatic *portions* of an LRMP may rely upon subsequent site specific consultations. In *Swan View*, plaintiffs claimed that the FWS violated the ESA by failing to prepare an adequate biological opinion addressing the impact of the USFS' adoption of the Flathead Forest Plan (an LRMP) on the threatened grizzly bear and the endangered gray wolf. The plaintiffs' claim was premised upon the fact that specific portions of the Flathead Forest Plan—such as resource production objectives and zoning decisions—failed to include evaluations of impacts on the listed species. *Id.*, 824 F.Supp. at 933. The court rejected this argument, finding that the FWS "properly focussed on the standards and guidelines adopted in the Plan which directly relate to the protection of threatened and endangered species." *Id.*, at 933. *See also Village of False Pass v. Clark*, 733 F.2d 605, 607 (9th Cir.1984) (finding biological

opinion adequate even though it failed to specifically address drilling and seismic testing limitations to protect gray and right whales).[12] The court further noted that it was particularly "impressed" by the consideration for the grizzly bear included in the Forest plan through the adoption of a set of "inter-agency grizzly bear guidelines." *Id.*

Defendants concede that *Swan View* differs from this case because the FWS had in fact engaged in ESA consultations on the listed species. Defendants argue, however, that the crux of plaintiffs' argument that ASQ or floodplain management guidelines might have differed had the USFS consulted with NMFS essentially mirror the claims rejected by the court in *Swan View*. I find *Swan View* is clearly distinguishable because the challenge was limited to the adequacy of the biological opinion whereas in this case there is nothing to review since the USFS has not determined, either on its own through a biological assessment, or in consultation with the NMFS, whether the LRMPs may affect listed salmon species.[13] The district court specifically found that additional future biological consultations on site specific issues made sense in part, *because* the Forest

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[12] Unlike *Conner*, the court in *Village of False Pass*, found the step ESA consultation process acceptable by relying in part, upon the 3-step process prescribed in the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1331, for off-shore oil drilling. The court approved the step application for ESA consultation in large part because the Secretary included prominent disclaimers at each phase (lease, exploration, development & production), retaining discretionary authority to suspend activity whenever migrating whales were located near the area. *Village*, 733 F.2d at 611.

[13] Defendants did engage in ESA consultations in connection with the LRMPs for "then-listed" species (1990—the date of adoption) such as the bald eagle.

Plan included an analysis of the "detailed standards and guidelines adopted" for the protection of the listed species, *Id.*, at 933, which are not present in this case.

In *Conner v. Burford*, 848 F.2d 1441 (9th Cir.1988), *cert. denied*, 489 U.S. 1012, 109 S.Ct. 1121, 103 L.Ed.2d 184 (1989), the USFS requested formal consultations with the FWS regarding impacts of an oil and gas lease program on listed species (grizzly bear, gray wolf, bald eagle and peregrine falcon) in the Flathead National Forest. Both the FWS and USFS agreed that they had insufficient information to render a comprehensive biological opinion on the program, and, instead, decided to engage in consultations and preparation of additional biological opinions at various stages of post-leasing activities. *Id.*, at 1444. Plaintiffs challenged the USFS and FWS on NEPA grounds and on grounds that the sale of leases without a biological opinion assessing the impact of post-leasing activities on endangered species violated the ESA. The district court agreed, setting aside all agency actions allowing the issuance of oil and gas leases and enjoining the government from issuing or recommending any more leases until compliance with the ESA and NEPA. *Id.*, at 1445. On review, the court reversed the district court's conclusion on several of the alleged NEPA violations, but affirmed the district court's ESA conclusions. The court specifically rejected the defendants' proffered "incremental step consultation" as a substitute for a comprehensive biological opinion, noting that species like the grizzly "require large home range making it crucial that ESA review occur early in the process to avoid piecemeal chipping away of habitat." The court expressly rejected any attempt to read into the ESA an authorization for incremental step consultation,

noting that § 7(d), which "prohibits the irreversible or irretrievable commitment of resources which might foreclose reasonable and prudent measures, acts to ensure that the status quo be maintained during the consultation process." *Id.*, at 1455, n. 34.

Defendants argue that *Conner* should be distinguished from this case because, unlike a lease, the LRMP is a "broad framework" for management—not a commitment to development—so that additional review at each subsequent stage of development will adequately protect the species. *See e.g. Swan View*, 824 F.Supp. at 936. In addition, defendants point out that, unlike *Conner* and *Swan View*, plaintiffs do not contend that the LRMPs were illegal when adopted in 1990—and that instead, the issue is whether *re-initiation* of ESA consultation is required given the subsequent listing of Snake River chinook.

In their response to plaintiffs' statements of material facts, government defendants argue that the LRMPs are "not agency actions for purposes of the ESA." Yet in their opposition brief and memo in support of their motion for summary judgment, defendants acknowledge that the LRMPs clearly are agency actions, but argue that they were "complete" upon their adoption in 1990. They even go so far as to analogize the LRMPs to the "completion of a dam." I find both arguments and the analogy contrary to the descriptions of the LRMPs by Lowe and Schmitten—the LRMPs are clearly agency actions with ongoing application to current and future activities, and further, defendants acknowledge that the LRMPs are *subject* to modification and review.

Defendants have also argued that the LRMPs have no application to the "jeopardy" determination made by NMFS. I have construed this argument as further support for what is essentially a contention that

there is no rational connection between the ESA consultation process and the LRMP. The flaw in this suggestion is that the "jeopardy" determination by NMFS is really just the last step of the ESA process. The first two steps which are taken solely by the USFS—the biological evaluation and the determination of "no effect" or "may affect"—are implemented pursuant to the LRMP. The LRMP's endangered species guideline directs the USFS to comply with the ESA and the USFS' determination of "no effect" or "may affect" are made by reference to LRMP guidelines. For example, in the Tucannon Basin biological assessment for the Dry Creek/Phillips Creek/Gordon Creek/Cabin Creek Watersheds in the Umatilla Forest, two timber sale units, Little Big Hole 21 and 54 were initially classified as "likely to adversely affect" salmon habitat because they would include harvest within 20-50 feet of a perennial stream and their removal would increase stream temperature. Both sales units were modified to provide a 100 foot no-cut buffer zones, consistent with LRMP Watershed Guideline # 6, and thereafter re-classified as an activity "not likely to adversely affect." *See also* Asotin Creek Watershed Assessment (noting similar buffer modification and reclassification).

Aside from the difference in timing, I find little to distinguish the LRMPs in this case from the Jamison Strategy analyzed in *Lane County Audubon*—site-specific projects and activities are implemented pursuant to LRMP standards and guidelines and, thus, under *Lane County Audubon*, constitute agency actions to which the ESA three-step consultation process applies.

In addition, I note that the environmental impact statements to the LRMPs, prepared as required

under NEPA, specifically acknowledge that the LRMPs are "major federal actions," which may be "amended or revised to respond to changing needs and opportunities." NEPA consultations are only required for "major federal actions" having a significant effect on the human environment, 42 U.S.C. § 4332(2)(C), while the three-step review process under the ESA is triggered for "*any* action" taken by an agency. 16 U.S.C. § 1536(a)(2). *See Conner*, 848 F.2d at 1457-58, n. 40 (strict substantive provisions of the ESA just more stringent enforcement of its procedural requirements compared to NEPA).

Finally, the language of ESA itself suggests that it applies with equal force to actions "authorized," in the past tense under § 7(a)(2), as well as "prospective" agency actions under § 7(a)(3). Had Congress intended that the ESA should apply only to actions authorized or undertaken *after* a pertinent listing decision, it could well have provided such a "prospective" limitation within § 7(a)(2). Had the challenged agency action been the authorization of certain specific timber sales which were completed in 1990, defendants would in all likelihood prevail on mootness grounds. However, I find that the ongoing application of the LRMP to current and future actions makes it a viable candidate for ESA consultation. There is simply nothing in the ESA or its implementing regulations to suggest that the term "agency action" is limited to those programs instituted *following* a listing decision, and further such a temporal restriction would be contrary to the Ninth Circuit's directive that the term be "broadly construed." *Lane County Audubon*, 958 F.2d at 294, *citing Conner*, 848 F.2d at 1452.

Defendants' argument that it would be unduly burdensome to require amendment of the LRMPs

each time a resident species is listed misses the mark since this case is not concerned with compliance with the NFMA—i.e. whether there are adequate guidelines in place to ensure the "viability" of existing species—but is strictly limited to procedural and substantive compliance with the ESA. The ESA does not directly require amendment of the LRMP, but merely requires that the USFS start the three step process of biological examination and possible consultation.

I am sympathetic to the confusion created when two statutes—in this case the NFMA and the ESA—both require protection of the listed species and understand why defendants would take the position that by consulting on all site-specific and project-specific activities and by studying habitat conditions within watersheds and attempting to create new guideline amendments for the LRMPs to enhance endangered species protection, they would, in effect, be complying with the spirit of the ESA by working to protect listed chinook. However, while one might be able to conclude from the evidence presented that defendants are in compliance with the NFMA, where both the NFMA and ESA apply, both statutes must be followed. *See Seattle Audubon Society v. Evans*, 952 F.2d 297, 302 (9th Cir.1991) (compliance with ESA failed to excuse violations of NFMA's requirement that USFS maintain a "viable" owl population).

Based on the foregoing, I find that the Wallowa-Whitman and Umatilla LRMPs are "agency actions," which are being and will be applied to areas in which listed chinook are present since they set forth standards and guidelines for modification of, and multiple-use of resources within listed species habitat. Accordingly, the USFS must apply the ESA

three-step consultation procedure to the Wallowa-Whitman and Umatilla LRMPs.[14]

(4) *Injunctive Relief*

Plaintiffs have submitted a list of ongoing and proposed projects within the Umatilla and Wallowa-Whitman for which they seek injunctive relief. The lists identify timber, range and road building projects which the USFS has determined "may adversely affect" listed species. Because defendants have halted activities which are likely to adversely affect listed species pending consultation, the bulk of activities identified by plaintiffs are those which the USFS has classified as "not likely to adversely affect." In his third declaration, Rick Roberts reviewed plaintiffs' lists of activities for which they seek injunctive relief and has identified 8 timber projects and 5 road construction projects from the Umatilla forest and 12 timber projects from the Wallowa-Whitman forest which are already complete. In addition, Roberts noted that several "range" projects were closed, vacant or voluntarily not used for 1993.

The Ninth Circuit has held that the traditional sliding scale test for preliminary injunctions,

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[14] I specifically decline to specify whether consultation between the USFS and NMFS should be formal or informal since the nature of such a consultation will necessarily depend upon the outcome of a USFS biologists' evaluation and a USFS classification—neither of which have taken place yet.

Once the USFS makes such a determination, however, its decision is subject to the arbitrary and capricious standard of review set forth in the APA. *See e.g. Seattle Audubon Society v. Evans*, 771 F.Supp. 1081, 1096 (W.D.Wash.), *aff'd in part* 952 F.2d 297, 298 & 302 (9th Cir.1991). Accordingly, I specifically decline the suggestion of both parties to "predict" either a "no effect" or a "may affect" classification.

weighing harms against the likelihood of success on the merits, is inapplicable for injunctions sought under the ESA. *Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir.1987), *citing TVA v. Hill*, 437 U.S. at 173, 98 S.Ct. at 2291. Instead, a plaintiff seeking redress for violations of the ESA is entitled to injunctive relief if the agency "violated a substantive or procedural provision of the ESA," since Congress established both substantive and procedural provisions to assure adequate protection of the listed species. *Id*, at 1384.

Thus, because I have found that defendants violated the ESA by failing to initiate the § 7(a)(2) consultation process, plaintiffs are entitled to injunctive relief. However, because the nature of the challenged activity is far broader than the single construction project enjoined in *Sierra Club* and *TVA v. Hill*, the necessary scope of injunctive relief is more problematic. As noted previously, the Ninth Circuit has suggested that section 7(d) seeks to maintain the "status quo" during the consultation process. *Lane County Audubon*, 958 F.2d at 294. However, the language of § 7(d) actually only prohibits an agency from making "any irreversible or irretrievable commitment of resources ... which has the effect of foreclosing the formulation or implementation of reasonable and prudent alternatives." Thus, certain ongoing activities which may be altered or modified upon completion of consultation, may proceed pending the outcome of consultation. *See e.g. National Wildlife Federation v. National Park Serv.*, 669 F.Supp. 384, 390 (D.Wyo.1987) (continued limited operation of campground pending findings on impact on grizzly bear not an "irreversible commitment" of resources proscribed by § 7(d)). Because the language in the prohibition under § 7(d) does not directly correlate to any of the classifications used by

the USFS under § 7(a)(2)—i.e. "may affect," "likely to adversely affect," or "not likely to adversely affect,"—I find that it would be inappropriate to enjoin or to permit any entire USFS classification of activity.

Again, *Lane County Audubon* provides some guidance on this issue. There, the court held that, pending § 7 consultation on the Jamison Strategy, the BLM would be enjoined from conducting any "new" timber sales, finding that the timber sales "are such [§ 7(d)] commitments." 958 F.2d at 293 & 295. However, the court held that sales announced in 1991, but not yet awarded, were "somewhat different," because they had been submitted to the FWS for individual consultations and remanded the issue of injunctive relief as to the 1991 sales to the district court. *Id.*, at 293. In the January 27, 1993 opinion and order of the district court on remand, Judge Jones prohibited the BLM from "announcing or awarding or conducting any additional sales," but excluding 1991 sales already announced "until a later date if necessary."

Applying the principles from *Lane County Audubon* to the facts in this case, the USFS is enjoined from announcing, awarding or conducting any *additional* timber sales, range activities/grazing permits, or road building projects pending compliance with ESA § 7. As for the ongoing or currently proposed projects identified by plaintiffs which have been announced, but which have not yet been completed, I note that the USFS has specifically determined that these projects not only are not likely to affect listed species, but also that they "have been found not to make any irreversible or irretrievable

commitment of resources."[15] The ESA mandates that an agency determination be given deference upon judicial review unless the action is "arbitrary, capricious or otherwise not in accordance with the law." 5 U.S.C. § 706; *Delaney v. E.P.A.*, 898 F.2d 687, 689 (9th Cir.), *cert. denied*, 498 U.S. 998, 111 S.Ct. 556, 112 L.Ed.2d 563 (1990). Plaintiffs have not challenged the USFS' determination that the identified actions do not constitute an irreversible or irretrievable commitment of resources, nor do I have a record before me which would permit judicial review of these determinations. Accordingly, the scope of injunctive relief shall be limited to any proposed future actions within the Wallowa-Whitman and Umatilla forests which fall within the definition of a § 7(d) irreversible or irretrievable commitment of a resource during the consultation period.

CONCLUSION

Based on the foregoing, I find that the USFS has violated the ESA by failing to comply with § 7 regarding the continued implementation of the Wallowa-Whitman and Umatilla LRMPs and I enjoin any future activities which fall within the scope of § 7(d) pending compliance. Accordingly, plaintiffs' motions for partial summary judgment # 53 and # 78 and motion for injunction # 91 are GRANTED as set forth in this opinion. Government defendants' motion to dismiss # 82 and defendant-intervenors' motions for summary judgment # 62 and # 81 are DENIED.

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[15] *See* the Second Declaration of Rick Roberts, page 8.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 92-1322-MA

PACIFIC RIVERS COUNCIL, ET AL., PLAINTIFFS

v.

F. DALE ROBERTSON, ET AL., DEFENDANT

[Filed Dec. 3, 1993]

ORDER

MARSH, Judge.

On October 25, 1993, I issued an amended opinion in which I granted plaintiffs' motions for partial summary judgment and for an injunction against future forest activities pending, but declined to enjoin ongoing projects which the forest service had determined were "not likely to affect listed species" and that "have been found not to make any irreversible or irretrievable commitment of resources" under ESA § 7(d).

Plaintiffs now move for reconsideration of the scope of the injunctive relief ordered and ask that I extend the injunction to all on-going activities that "may adversely affect"—a classification which

includes "not likely to adversely affect"—threatened species.

Although I decline to reconsider my opinion, I do wish to address a few points raised in plaintiffs' motion. First, plaintiffs correctly note that they did in fact argue that the Forest Service should not have permitted ongoing activities pending ESA consultation for the LRMPs. However, this argument was raised within the context of plaintiff's request for injunctive relief—the complaint and liability claims challenged only the Forest Service's decision not to engage in ESA consultations on the LRMPs. I agree with defendant-intervenors' response to this motion that the Forest Service's determination that particular ongoing actions did not involve irretrievable commitments of resources were neither directly challenged nor specifically placed before me for my review under applicable arbitrary and capricious or abuse of discretion standard. To hold that the Forest Service violated of [*sic*] the ESA without undertaking the requisite substantial, but deferential analysis of specific records would be contrary to established law in this circuit. *See e.g. National Audubon Society v. U.S. Forest Service*, No. 91-35214, slip op. 9921 (9th Cir. September 15, 1993).

Second, plaintiffs correctly note that the Ninth Circuit's decision in *Lane County Audubon Society v. Jamison*, 958 F.2d 290 (9th Cir. 1992) does not directly address the status of ongoing activities. My reliance upon *Lane County* for "guidance" in determining the scope of an appropriate injunction in this case was limited to noting that the court obviously found some difference between future and ongoing activities since it only enjoined the former and remanded the latter for further consideration by the district court. Absent further guidance from the

court regarding the appropriate scope of an injunction in these or comparable circumstance, *see Resources Ltd., Inc. v. Robertson*, No. 92-35047, slip op. 12461, at 12477 (9th Cir. November 3, 1993), I decline to re-examine the issue further. Further, for the reasons set forth above and previously in my Opinion of October 26, 1993, I decline to exercise the discretion provided under Fed. R. Civ. P. 62(c) to grant injunctive relief pending appeal.

Based on the foregoing, plaintiffs' motion for reconsideration or for an injunction pending appeal (#136) is DENIED.

IT IS SO ORDERED.

DATED this 3 day of December, 1993.

/s/ Malcolm F. Marsh
MALCOLM F. MARSH
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 92-1322-MA

PACIFIC RIVERS COUNCIL, ET AL., PLAINTIFFS

v.

JACK WARD THOMAS, ET AL., DEFENDANTS

[Filed Oct. 20, 1994]

OPINION

MARSH, Judge.

This action comes to me on remand from the Ninth Circuit Court of Appeals directing that I enter an injunction pending re-initiation of § 7(a)(2) consultations on Land Resource Management Plans (LRMPs) for the Umatilla and Wallowa-Whitman National Forests. In addition, the court directed that if the Forest Service (FS) re-initiated consultations, I should then consider whether ongoing or announced activities should proceed during the consultation process. My original injunction prohibited the Forest Service from awarding or announcing any new or additional commitments of resources pending compliance with the ESA.

Since the mandate issued, the Forest Service has re-initiated consultation under § 7(a)(2) on the challenged LRMPs and plaintiffs have filed a motion for permanent injunction pending completion of those consultations. According to the parties' submissions at oral argument, of the 1700 individual projects identified in the Ninth Circuit's opinion as the relevant inquiry for an injunction, approximately 307 units (groups of projects) remain at issue, 139 in the Wallowa-Whitman Forest and 182 in the Umatilla. The government also avers that there are no ongoing road construction activities currently taking place.

In addition to re-initiation of the §7(a)(2) consultations on the LRMPs, defendants have conducted § 7(d) evaluations on the challenged "not likely to adversely affect"[1] (NLAA) projects (either individually or in groups) and issued determinations that all of the proposed ongoing activities described in exhibits D-ZZ will not result in the irreversible or irretrievable commitment of resources which will foreclose the implementation of reasonable and prudent alternatives being contemplated with the LRMP consultations or the draft of PACFISH. Plaintiffs contend that these § 7(d) determinations are irrelevant pending the Forest Service's compliance with § 7(a)(2).

Although the mandate implies that the questions of the scope of the injunction on remand is a relatively simple one, the parties' well-stated, but widely diverging memoranda suggest otherwise.

Plaintiffs contend that all ongoing "may adversely affect" road building, timber harvesting and grazing

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[1] The Forest Service represents that all activities identified as "likely to adversely affect" will be halted pending completion of consultations.

activities must be halted until consultation is complete on the biological opinions for the LRMPs. At the hearing on the motion for permanent injunction, plaintiffs explained that the crux of the problem is that "may adversely affect" projects have and continue to proceed without the concurrence of the National Marine Fisheries Service (NMFS) or consultation at any level.[2] In support of this analysis, plaintiffs rely upon legislative history and those portions of the Ninth Circuit's opinion which indicate that the FS' conclusion that ongoing activities "may affect" listed salmon is "sufficient reason to enjoin these projects," and the court's reference to *Lane County* and its injunction on new sales until consultation was "completed." *PRC*, slip op. at 7441; *see also Lane County Audubon Soc. v. Jamison*, 958 F.2d 290, 293 (9th Cir. 1992) ("We enjoin pending completion of such consultation [on the Jamison strategy], the award of any sales that may be announced in the future.").

The FS contends that once 7(a) consultations are initiated on the LRMPs, the FS has the discretion to allow certain projects to continue if and when the FS determines that these projects meet the two-pronged

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[2] Shortly after the listing decisions, the FS and NMFS agreed to consult on projects on a watershed-wide basis in lieu of engaging in site-specific consultations. Thus, NMFS has not given written concurrence for any of the FS' site specific NLAA findings as required under 50 C.F.R. 402.13 to complete informal consultation.

To date, only one watershed consultation has been completed and that is for the Tucannon Subbasin. Fifteen other watershed consultations are pending for the Wallowa-Whitman and Umatilla forests and, according to the government, have been suspended pending completion of consultations on the LRMPs.

analysis of § 7(d). In light of this interpretation, the FS seeks to proceed with all NLAA activities addressed in its § 7(d) analyses pending completion of consultations on the LRMPs. In support of its position, the FS relies upon the statutory language of § 7(d) and those portions of the Ninth Circuit's opinion which reference the need only for "re-initiation" of § 7(a)(2) consultations before § 7(d) activates and the last line of the court's remand: "This [injunction against ongoing and announced projects] shall not preclude the district court from considering further modification to its injunction, in accordance with our opinion, if and when consultation is re-initiated." *Id.* at 7442.

Defendant-Intervenor NFRC's proposed analysis is similar to that of the FS, but would eliminate the need for express § 7(d) determinations. According to NFRC, once consultations are re-initiated on the LRMPs, the court is back to its original position and may rely upon the FS' original NLAA determinations to permit those NLAA activities to proceed pending completion of § 7(a) LRMP consultations because there is no threat of "harm."

These equally cogent but widely divergent views of the meaning of the mandate and the pertinent statutory procedure have made this a particularly troubling case for the court.[3] Although the Ninth Circuit directed me back to *Lane County Audubon* and *Connor*, I am compelled to return to the statute initially for guidance.

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[3] I am, however, heartened by the parties' efforts towards stipulations that allow certain activities to continue and their indication at oral argument that they may be able to reach agreement on the continuation of certain federal activities which may be necessary to avoid greater harm threatened by alternative private actions.

Section 7(d) was one of the 1978-79 Amendments to the ESA responsive to the Supreme Court's decision in *TVA v. Hill*, 437 U.S. 153 (1978). *See generally North Slope Borough v. Andrus*, 486 F. Supp. 332, 351 (D.D.C. 1979), *aff'd in part, rev'd in part*, 642 F.2d 589 (D.C. Cir. 1980). As Senator Culver explained, § 7(d) was designed to avoid the situation wherein a construction project reaches a stage at which options which might have been available at the outset of the project are no longer reasonable or prudent because of the foregone commitment of resources. *Id.* at 355. "Congress enacted 7(d) to prevent federal agencies from 'steamrolling' activity in order to secure completion of projects regardless of their impacts on endangered species." *Id.* at 356. Alternatives within the § 7(a)(2) process must be "consistent with the intended purpose of the action [and such] that they can be implemented within the scope of the Federal agency's authority and jurisdiction, [and in a manner] that is economically and technologically feasible." 50 C.F.R. 402.02. Thus, by ensuring consultation takes place prior to the commitment of resources, Congress specifically sought to prevent a situation like the Tellico Dam wherein opening of the dam would have violated the ESA, but closing the dam would not have constituted a reasonable, economically feasible alternative in light of the $78 million investment. *See id.* at 355, n. 79, *and* 356.

Because the text of § 7(d) is so critical to resolution of the issue with this remand, I set it out again:

> "After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing

> the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section."

Thus, under the express language of the statute, the federal agency is only prohibited from making those commitments which involve the following two elements: (1) an irreversible or irretrievable commitment of resources; (2) which foreclose the formulation or implementation of reasonable and prudent alternatives.

In *North Slope*, the district court found that, even though Bureau of Land Management (BLM) violated § 7(a)(2) by failing to analyze all impacts of all stages of an oil and gas leasing project, expensive pre-exploration activities did not constitute 7(d) commitments because the research gained would be necessary in conducting a § 7(a)(2) analysis as well as promoting the lease program. *Id.* at 357. Thus, even though pre-exploration activities committed significant monetary resources, the circuit court affirmed this analysis of section 7(d). 642 F.2d at 611.

In *Connor v. Burford*, 848 F.2d 1441 (9th Cir. 1988), the court addressed a similar issue involving a multi-stage oil and gas lease program. Like *North Slope*, the court found that the BLM's reliance upon a biological opinion, which segmented analysis into phases of construction, was inadequate because it committed significant resources to a project that had the potential to jeopardize listed species prior to any consideration of the impacts of the "entire" agency action. *Id.*, at 1453. The court rejected the BLM's suggestion that comprehensive consultations could be avoided based upon the need for additional data. *Id.*, at 1455. However, unlike *North Slope*, the Ninth Circuit did not engage in the two-step § 7(d) analysis

as applied to specific lease and post-leasing activities, but simply applied § 7(d) to enjoin any "further leasing," or ground disturbing activities prior to the preparation of a comprehensive biological opinion. *Id.*, at 1458. In a footnote comparing NEPA to the ESA, the court stated that § 7(d) was not intended to amend section 7(a) in such a way as to condone the BLM's proposed incremental step compliance, but was meant to "clarif(y) the requirements of section 7(a), ensuring that the status quo will be maintained during the consultation process." *Id.*, 848 F.2d at 1455, n.34.

Under the language of the Ninth Circuit's remand, timber sales may not go forward because they constitute per se irreversible and irretrievable commitments of resources which violate § 7(d). Counsel for NFRC and the Forest Service make some compelling arguments regarding the impact of *National Wildlife Federation v. Burlington Northern Ry.*, 23 F.3d 1508 (9th Cir. 1994) and the accuracy of the court's citation to *Lane County Audubon*, the most questionable of which is the absence of any reference to the need for a showing of the second prong of the § 7(d) inquiry to obtain an injunction.

Nevertheless, I find that this directive is part of the law of the case. Accordingly, the Forest Service is enjoined from allowing any "may adversely affect" timber harvest activities, including NLAA timber harvest activities, to proceed pending completion of § 7(a) consultations on the LRMPs.

However, even if I went past the Ninth Circuit's conclusion that *per se* irreversible timber harvests justify an injunction under § 7(d), I would nevertheless conclude that defendants fail to satisfy the second prong of the 7(d) analysis regarding the

potential foreclosure of reasonable and prudent alternatives. The crux of the difficulty in applying the second prong of § 7(d) is an apparent contradiction contained in the statute itself and carried forward with the Ninth Circuit's mandate: first, § 7(d) specifies that ongoing activities may proceed after *initiation* of consultation, not completion, as plaintiffs contend and as the Ninth Circuit recites from *Lane County*.

However, in defining which activities may proceed following initiation of consultation, § 7(d) refers to the potential foreclosure of "reasonable and prudent alternative measures." The phrase "reasonable and prudent alternatives" is a term of art in the ESA. Section 7(b)(3)(A) describes the biological opinion (BO) which must be produced "after the conclusion of consultation" under § 7(a)(2), and "reasonable and prudent alternatives" are a product of that formal consultation process. *See also* 50 CFR 402.02.[4]

With regard to the NLAA projects, the FS argues that it has determined that no irreversible or irretrievable commitment of resources has been made which would preclude the implementation of reasonable and prudent alternatives. While some logic can be found in the determination that nothing

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[4] "Reasonable and prudent alternatives" are defined by the regulations as "alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action . . . and that the Director [of NMFS] believes would avoid the likelihood of jeopardizing the continued existence of listed species or result(ed) in the destruction or adverse modification of critical habitat." 50 CFR 402.02. The similar phrase "reasonable and prudent measures" is also a product of formal consultations and refers to those measures necessary to minimize incidental takes. *Id.*

in the continued activity is irreversible or irretrievable, I do have a problem with the reasoning which concludes that no alternatives are precluded when no "reasonable and prudent alternatives" have been identified. Until consultations reach a stage at which reasonable and prudent alternatives are identified in the BO process, any § 7(d) analysis necessarily must be premised upon guesswork. This difficulty is borne out by the parties' divergent views on what the interim standards should be. Wallowa County would have the court impose the Wallowa County/Nez Perce Tribe Salmon Recovery Plan while the FS urges the court to adopt a combination of ideas generated from PACFISH and potential refugia guidelines. From my exposure to salmon recovery plans in other, related cases, I recognize that the choices for interim standards are abundant. Until the BO reaches a stage in which the numerous theories about salmon protection measures are identified and articulated, PACFISH standards and Salmon Recovery Team recommendations are simply ideas. They are not, or at least not yet, "reasonable and prudent alternatives measures" as that term is defined in the statutes and regulations.

Thus, rather than engage in this guesswork, I find that all NLAA timber activities, save and except any that may fall within the stipulation of the parties, must be halted at least until reasonable and prudent measures are identified within the § 7(a)(2) consultation process for the LRMPs.

During oral argument, the FS raised the point that several of the timber harvest activities with which it wishes to proceed pending completion of consultations on the LRMPs are located as far as six miles from the nearest salmon spawning habitat. While this may well be true, it must be remembered

that it was the FS that made the initial determination that these particular timber activities "may adversely affect" the listed species. Although this determination was further defined as an NLAA activity, I cannot square the earlier "may affect" determination against the current assertion of *de minimis* effect. To reach such a conclusion would be akin to reclassifying the FS' determinations from a "may adversely affect" to a "no effect," something all parties would agree the court has no authority to do.

In addition, even if I accepted the FS' conclusion regarding the appropriate procedure to follow after re-initiation of consultations, I have reviewed the § 7(d) documents and note that the volume of documentation could only be possible through the relatively modern advent of word processors. For example, Forest Service biologist Del Groat was able to issue eight § 7(d) analyses covering 28 sets of ongoing rangeland activities, and 113 timber sale units all on August 11, 1994, just 13 days following the filing of the Ninth Circuit's order enjoining "any" rangeland activities pending "completion of consultation" on the LRMPs. Although I note that the analysis contained in these § 7(d) documents is not identical, it is nearly so and the majority is clearly boilerplate. Other than a few references to the fact that some of the NLAA activities take place outside the critical habitat and a few notations to the concern about the burden posed by private landowner grazing, these documents are conclusory and devoid of actual site specific analysis. They neither identify what reasonable and prudent alternative are being considered, nor do they expressly apply the PACFISH or "refugia" criteria set forth in Rick Roberts' Declaration.

I further find that any "may adversely affect" road construction or maintenance activities are closely analogous to timber harvests and thus, the same rules should apply. Plaintiffs concede that any injunction against "may adversely affect" road construction activities would *not* preclude road maintenance or road improvement activities designed to benefit the species through, for example, sedimentation prevention.

As for grazing and the removal of downed timber, I have no Ninth Circuit directive that these activities constitute *per se* irreversible or irretrievable commitments of resources. Based upon my analysis of the current status of reasonable and prudent alternatives, *supra*, I assume and find that defendants cannot show that continuation of NLAA grazing and timber removal might not foreclose the implementation of such alternatives. However, section 7(d)'s two-part analysis is stated in the conjunctive. Therefore I must still have to find that the challenged NLAA grazing and timber removal activities constitute irreversible or irretrievable commitments of resources before an injunction under § 7(d) may enter.

First, I note that these challenged activities do not involve the commitment of vast financial resources as was the case in *TVA v. Hill*, *North Slope* or *Connor*. Thus, the potential to "steamroll" these projects through without the benefit or prior consultation to secure its completion is not threatened with grazing and timber removal.

Second, although I disagree with the federal defendant's assertion that ongoing grazing constitutes the "status quo," I do accept their proffer that grazing and timber removal are the types of activities that are simply not irreversible because they are subject to

amendment and modification by the FS at any time. During oral argument, the FS offered exhibit EE as an example of a grazing permit which received an NLAA determination and a negative § 7(d) determination which permitted the activity to continue. However, following both determinations, the FS nevertheless elected to remove the cattle from portions of the allotment to prevent the possibility of that cattle would stray to critical streamside habitat. Although this kind of modification of an ongoing activity is not possible for a timber cut or the drilling of an oil well, it is possible with grazing and timber removal. Cattle may be moved, fenced, and herded to control their impacts throughout the duration of the permit. Similarly, timber may be removed by air, vehicle or animals and removal times may be altered to avoid sedimentation concerns.

According to the Ninth Circuit, once the federal defendants initiate consultations on the LRMPs, certain activities might proceed if I find that to do so would not violate § 7(d). *PRC*, slip op. at 7441-42. Because I find that ongoing NLAA grazing and removal of downed timber do not constitute irreversible or irretrievable commitments of resources at the present time, these activities may proceed pending completion of § 7(a) consultations on the LRMPs. This is not to say, however, that these activities may *never* constitute 7(d) commitments. The Forest Service remains under a duty to ensure that these NLAA activities do not become likely to adversely affect activities which might pose a threat of harm to the listed species.

Conclusion

Based on the foregoing, plaintiffs' motion for a permanent injunction (#170) is GRANTED in part and DENIED in part as follows:

GRANTED as to:

(1) All "may adversely affect" (which includes disputed NLAA activities) timber harvest and road construction and maintenance activities are enjoined pending the identification of reasonable and prudent alternatives within the § 7(a) consultation process on the LRMPs;

(2) All "likely to adversely affect" timber removal and grazing activities are enjoined pending the identification of reasonable and prudent alternatives within the § 7(a) consultation process on the LRMPs; and

DENIED as to:

(1) All 1994-95 winter NLAA grazing permits; and

(2) All NLAA removal of downed timber activities.

DATED this 20 day of October, 1994.

/s/ Malcolm F. Marsh
MALCOLM F. MARSH
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 92-1322-MA

PACIFIC RIVERS COUNCIL, ET AL., PLAINTIFFS

v.

JACK WARD THOMAS, ET AL., DEFENDANTS

[Filed Oct. 20, 1994]

ORDER

MARSH, Judge.

In accordance with my opinion filed on this date, plaintiffs' motion for a permanent injunction (#170) is GRANTED in part and DENIED in part as follows:

GRANTED as to:

(1) All "may adversely affect" (which includes disputed NLAA activities) timber harvest and road construction and maintenance activities are enjoined pending the identification of reasonable and prudent alternatives within the § 7(a) consultation process on the LRMPs;

(2) All "likely to adversely affect" timber removal and grazing activities are enjoined pending the identification of reasonable and prudent alternatives

within the § 7(a) consultation process on the LRMPs; and

DENIED as to:

(1) All 1994-95 winter NLAA grazing permits; and

(2) All NLAA removal of downed timber activities.

IT IS SO ORDERED.

Dated this 20 day of October, 1994.

/s/ Malcolm F. Marsh

MALCOLM F. MARSH

United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 92-1322-MA

PACIFIC RIVERS COUNCIL, ET AL., PLAINTIFFS

v.

JACK WARD THOMAS, ET AL., DEFENDANTS

[Filed Oct. 20, 1994]

JUDGMENT

MARSH, Judge.

Based on the record,

IT IS ORDERED AND ADJUDGED that plaintiffs' request for permanent injunctive relief is GRANTED in part and DENIED in part as follows:

GRANTED as to:

(1) All "may adversely affect" (which includes disputed NLAA activities) timber harvest and road construction and maintenance activities are enjoined pending the identification of reasonable and prudent alternatives within the § 7(a) consultation process on LRMPs;

(2) All "likely to adversely affect" timber removal and grazing activities are enjoined pending the

identification of reasonable and prudent alternatives within the § 7(a) consultation process on the LRMPs; and

DENIED as to:

(1) All 1994-95 winter NLAA grazing permits; and

(2) All NLAA removal of downed timber activities.

This directive is in addition to the injunction entered previously on October 25, 1993.

Dated this 20 day of October, 1994.

/s/ Malcolm F. Marsh
MALCOLM F. MARSH
United States District Judge

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

D.C. No. CV 92-1322-MA

Nos. 93-36162 and 94-35042

PACIFIC RIVERS COUNCIL;
OREGON NATURAL RESOURCES COUNCIL;
HELLS CANYON PRESERVATION COUNCIL;
THE WILDERNESS SOCIETY;
OREGON NATURAL DESERT ASSOCIATION;

Plaintiffs-Appellants-
Cross-Appellees

v.

JACK WARD THOMAS, IN HIS OFFICIAL
CAPACITY AS CHIEF OF THE UNITED
STATES FOREST SERVICE;
UNITED STATES FOREST SERVICE;

Defendants-Appellees-
Cross-Appellants

[Filed September 22, 1994]

ORDER

Before: WRIGHT, TANG and REINHARDT, Circuit Judges.

The panel voted to deny appellees-cross-appellants' petition for rehearing. Judges Wright and Tang recommend rejection of the suggestion for rehearing en banc. Judge Reinhardt has voted to reject to the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

D.C. No. CV 92-1322-MA

Nos. 93-36162 and 94-35042

PACIFIC RIVERS COUNCIL;
OREGON NATURAL RESOURCES COUNCIL;
HELLS CANYON PRESERVATION COUNCIL;
THE WILDERNESS SOCIETY;
OREGON NATURAL DESERT ASSOCIATION;

Plaintiffs-Appellants-
Cross-Appellees

v.

JACK WARD THOMAS, IN HIS OFFICIAL
CAPACITY AS CHIEF OF THE UNITED
STATES FOREST SERVICE;
UNITED STATES FOREST SERVICE;

Defendants-Appellees-
Cross-Appellants

[Filed August 4, 1994]

ORDER

Before: WRIGHT, TANG and REINHARDT, Circuit Judges.

It is ordered that the mandate issue forthwith. The district court shall resume control of this matter. This order shall be without prejudice to this court's authority to entertain and act upon petitions for rehearing or suggestions for rehearing en banc.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

D.C. No. CV 92-1322-MA

Nos. 93-36162 and 94-35042

PACIFIC RIVERS COUNCIL;
OREGON NATURAL RESOURCES COUNCIL;
HELLS CANYON PRESERVATION COUNCIL;
THE WILDERNESS SOCIETY;
OREGON NATURAL DESERT ASSOCIATION;

Plaintiffs-Appellants-
Cross-Appellees

v.

JACK WARD THOMAS, IN HIS OFFICIAL
CAPACITY AS CHIEF OF THE UNITED
STATES FOREST SERVICE;
UNITED STATES FOREST SERVICE;

Defendants-Appellees-
Cross-Appellants

[Filed July 29, 1994]

ORDER

Before: WRIGHT, TANG and REINHARDT, Circuit Judges.

The United States Forest Service is enjoined from announcing or awarding or conducting any logging, grazing or road-building projects, pending completion of consultation on the Wallowa-Whitman and Umatilla National Forest Land and Resource Management Plans in accordance with Section 7 of the Endangered Species Act, 16 U.S.C. § 1536(a)(2); none of the foregoing, however, shall prevent the Forest Service from proceeding with ongoing road maintenance projects. This injunction shall be effective immediately and shall continue in effect until issuance of this court's mandate or further order of this court. Further, we remand to the district court for the limited purpose of allowing it to issue such further orders as it may deem advisable 1) permitting the implementation of projects that benefit the salmon, and 2) enjoining road maintenance projects that adversely affect the salmon.

APPENDIX J

1. 16 U.S.C. 1536(a)(1), (a)(2) and (d) provide as follows:

§ 1536. Interagency cooperation

(a) Federal agency actions and consultations

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

* * * * *

(d) Limitation on commitment of resources

After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.

2. 16 U.S.C. 1604(a)-(f) provide as follows:

§ 1604. National Forest System land and resource management plans

(a) Development, maintenance, and revision by Secretary of Agriculture as part of program; coordination

As a part of the Program provided for by section 1602 of this title, the Secretary of Agriculture shall develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System, coordinated with the land and resource management planning processes of State and local governments and other Federal agencies.

(b) Criteria

In the development and maintenance of land management plans for use on units of the National Forest System, the Secretary shall use a

systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences.

(c) Incorporation of standards and guidelines by Secretary; time of completion; progress reports; existing management plans

The Secretary shall begin to incorporate the standards and guidelines required by this section in plans for units of the National Forest System as soon as practicable after October 22, 1976, and shall attempt to complete such incorporation for all such units by no later than September 30, 1985. The Secretary shall report to the Congress on the progress of such incorporation in the annual report required by section 1606(c) of this title. Until such time as a unit of the National Forest System is managed under plans developed in accordance with this subchapter, the management of such unit may continue under existing land and resource management plans.

(d) Public participation in management plans; availability of plans; public meetings

The Secretary shall provide for public participation in the development, review, and revision of land management plans including, but not limited to, making the plans or revisions available to the public at convenient locations in the vicinity of the affected unit for a period of at least three months before final adoption, during which period the Secretary shall publicize and hold public meetings or comparable processes at

locations that foster public participation in the review of such plans or revisions.

(e) Required assurances

In developing, maintaining, and revising plans for units of the National Forest System pursuant to this section, the Secretary shall assure that such plans—

(1) provide for multiple use and sustained yield of the products and services obtained therefrom in accordance with the Multiple-Use Sustained-Yield Act of 1960 [16 U.S.C. 528-531], and, in particular, include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness; and

(2) determine forest management systems, harvesting levels, and procedures in the light of all of the uses set forth in subsection (c)(1) of this section, the definition of the terms "multiple use" and "sustained yield" as provided in the Multiple-Use Sustained-Yield Act of 1960, and the availability of lands and their suitability for resource management.

(f) Required provisions

Plans developed in accordance with this section shall—

(1) form one integrated plan for each unit of the National Forest System, incorporating in one document or one set of documents, available to the public at convenient locations, all of the features required by this section;

(2) be embodied in appropriate written material, including maps and other descriptive documents, reflecting proposed and possible actions, including the planned timber sale program and the proportion of probable methods of timber harvest within the unit necessary to fulfill the plan;

(3) be prepared by an interdisciplinary team. Each team shall prepare its plan based on inventories of the applicable resources of the forest;

(4) be amended in any manner whatsoever after final adoption after public notice, and, if such amendment would result in a significant change in such plan, in accordance with the provisions of subsections (e) and (f) of this section and public involvement comparable to that required by subsection (d) of this section; and

(5) be revised (A) from time to time when the Secretary finds conditions in a unit have significantly changed, but at least every fifteen years, and (B) in accordance with the provisions of subsections (e) and (f) of this section and public involvement comparable to that required by subsection (d) of this section.

3. 50 C.F.R. 402.02 provides, in pertinent part:

Action means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to:

(a) actions intended to conserve listed species or their habitat;

(b) the promulgation of regulations;

(c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or

(d) actions directly or indirectly causing modifications to the land, water, or air.

SUPREME COURT, U.S.
FILED
FEB 27 1995
OFFICE OF THE CLERK

No. 94-1332

In the Supreme Court of the United States

OCTOBER TERM, 1994

JACK WARD THOMAS, CHIEF,
UNITED STATES FOREST SERVICE, ET AL., PETITIONERS

v.

PACIFIC RIVERS COUNCIL, ET AL.

BRIEF OF RESPONDENTS NORTHWEST FOREST RESOURCE COUNCIL, ET AL. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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BRIEF OF RESPONDENTS NORTHWEST FOREST RESOURCE COUNCIL, ET AL. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondents Northwest Forest Resource Council ("NFRC"), Intermountain Forest Industry Association ("IFIA"), Ellingson Lumber Co., Robert Messinger and County of Wallowa, Oregon (hereafter collectively referred to as "Intervenors"),[1] defendants-intervenors-appellees

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[1] None of the respondents has any parent, subsidiary or affiliated corporation.

below, submit this brief in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit filed by the Solicitor General on behalf of Jack Ward Thomas, Chief, United States Forest Service, et al.[2]

STATEMENT OF THE CASE

Intervenors adopt the Statement of the Case set forth in the petition, with the following supplemental statement:

A. Description of the intervenors.

NFRC is a not-for-profit Oregon corporation that represents associations and companies in the forest products industry in Oregon and Washington. C.R. 16. Its member associations serve several hundred companies in every segment of the forest products industry in the two-state region, from independent loggers and small sawmills to large vertically-integrated manufacturers. NFRC actively works to maintain the health and productivity of national forests in Oregon and Washington.[3]

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[2] Intervenors received the Solicitor General's petition on February 6, 1995. Under Sup. Ct. R. 12.4 this response is being filed within 20 days after the date of receipt of the petition.

[3] NFRC also initiates and participates in legal actions which may influence the volume and availability of federal timber from the national forests in Oregon and Washington, and from lands managed by the Bureau of Land Management in Oregon. *See, e.g., Robertson v. Seattle Audubon Society*, -- U.S. --, 112 S. Ct. 1407 (1992) (defendant-intervenor); *Northwest Forest Resource Council v. Espy*, 846 F. Supp. 1009 (D.D.C. 1994).

IFIA, a nonprofit Idaho corporation, is a trade association representing some 50 Idaho and Montana companies engaged in logging and manufacturing wood products. C.R. 16.

Ellingson Lumber Co. is a lumber manufacturer that employs 175 workers at its sawmill located in Baker City, Oregon. Ellingson has historically obtained 85 percent of its timber supply from the national forests in eastern Oregon and Idaho. C.R. 16.

Robert Messinger lives in the small town of Summerville, Oregon in the eastern part of the state. He hikes, camps, observes wildlife and hunts on national forest lands in Oregon including the Wallowa-Whitman and Umatilla national forests. C.R. 16.

The County of Wallowa, Oregon is a political subdivision of the state of Oregon headed by a three-person County Court. Sixty-three percent of the county's land base lies within national forest lands, including the Wallowa-Whitman and Umatilla national forests. C.R. 16. Historically, 40 percent of the county's budget has been supplied by Forest Service timber sale receipt payments. Grazing on national forest lands also contributes substantially to the county's economic base. The County has a strong interest in maintaining the health and productivity of the national forests within its boundaries.

B. Intervenors' participation below.

Shortly after the case was filed in district court in Oregon, the Intervenors obtained leave to intervene as defendants to oppose the relief sought by plaintiff Pacific Rivers Council. C.R. 26.

Intervenors' position was that the injunction requested by Pacific Rivers Council should be denied because it would cause more harm than good to the protected salmon stocks. The silvicultural (logging and road construction) projects at issue on the two forests had been designed in large measure to avoid catastrophic wildfires on the two national forests, and to help restore the failing ecological health of the forests that is threatened by drought, disease pathogens and infestation of defoliating insects. Intervenors contended that the requested injunctive relief would harm the forests and the fish by blocking these needed remedial projects.

Intervenors submitted testimony in the district court from Dr. Gregory M. Filip, a professor of ecology at Oregon State University, that a one to two year halt to pending timber and road projects on the Umatilla and Wallowa-Whitman national forests would increase the risk of further pest-caused tree mortality, wildfire incidence and general forest health decline, and would also adversely affect salmon habitat on the two forests. C.R. 105. Halting silvicultural projects would increase pest-caused tree mortality in riparian areas, producing loss of stream shading and increased water temperatures that are harmful to spawning salmon. Any catastrophic fire would cause tremendous erosion and degradation of fish spawning and rearing habitat. *Id.*

Intervenors also submitted testimony from wildfire expert Richard E. Montague, a retired Forest Service fire protection manager, that the current catastrophic fire risk on the Umatilla and Wallowa-Whitman national forests is very high, that the risk will increase if current silvicultural projects are delayed, that wildfires cause detrimental effects to salmon

fisheries, and that avoiding wildfires through silvicultural management helps protect salmon stocks. C.R. 104.

The district court never addressed this testimony since it held that it could not weigh the balance of harms in awarding injunctive relief once it found a procedural violation of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531, *et seq.* App. 42a.[4] The Ninth Circuit likewise never reached the balance of harms, enjoining the projects based solely on the Forest Service's finding that they "may affect" the protected salmon. App. 15a. The Ninth Circuit also stated that "timber sales constitute *per se* irreversible and irretrievable commitments of resources under § 7(d) and thus could not go forward during the consultation period." App. 16a, citing *Lane County Audubon Society v. Jamison*, 958 F.2d 290 (9th Cir. 1992).

C. The importance of the Forest Service timber sale program.

In 1897 Congress authorized the establishment of national forests "to furnish a continuous supply of timber for the use and necessities of citizens of the United States." 16 U.S.C. § 475. The Multiple-Use Sustained-Yield Act of 1960 recognizes timber as one of the five mandated resource outputs of the national forests. 16 U.S.C. § 528. For almost a century the national forests have served as an important source of timber supply for the American people. Most timber sales also contribute to the ecological health of

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[4] References to "App. --" refer to the appendix attached to the Solicitor General's petition.

the forest by removing decadent or diseased trees to allow new growth by healthy young trees.

The forest products industry in Washington and Oregon employed over 133,000 workers in 1990.[5] Every million board feet of timber sold by the Forest Service creates approximately nine full-time manufacturing jobs for one year.[6]

Forest Service and other federal timber provides more than one-third of all timber harvested in the Pacific Northwest,[7] a greater proportion than in other parts of the country. As a result, a large component of the forest products industry in the Pacific Northwest owns no private timber and depends largely or completely on purchases of federal timber to supply their mills. Many of these federally-dependent mills are small, family-owned businesses like Ellingson Lumber Co. which have supported timber-dependent communities for decades based almost entirely on timber sold by the Forest Service.

D. Harmful impacts of the Ninth Circuit's order.

The Ninth Circuit decision in this case has frustrated the purposes of the forest management laws, and imperiled the health of the forests, by blocking the operation of existing and planned timber sale contracts designed to achieve

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[5] Forest Service, United States Dep't of Agriculture, *Production, Prices, Employment, and Trade in Northwest Forest Industries, Second Quarter 1990* (1990) ("*Production, Prices*"), Table 20.

[6] *Id.*, Table 15, Table 20.

[7] *Id.*, Table 74.

Congressionally approved and environmentally desirable forest management goals.

Immediately following the Ninth Circuit decision, the Forest Service reinitiated section 7 consultation on the two forest plans and administratively halted operations on more than a dozen previously-awarded, enforceable timber sale contracts among some 300 pending projects it suspended on the two forests. App. 49a. Each of these contracts typically has a value well in excess of one million dollars.

On October 20, 1994 the district court on remand enjoined operations on all these timber sales (except certain very limited operations that were exempted by agreement of Pacific Rivers Council, App. 51a at n.3) until completion of the plan consultations. App. 60a.

The effect of the Ninth Circuit decision was to put loggers and truckers out of work immediately and to threaten the raw material supply for the mills that were relying on the timber from these contracts.

Although the ESA requires section 7 consultations to be completed within 90 days, 16 U.S.C. § 1536(b), the National Marine Fisheries Service ("NMFS") and the Fish and Wildlife Service ("FWS") rarely meet the statutory deadline. As the petition notes, most of the consultations initiated by the Forest Service when the Snake River salmon stocks were listed in 1992 still have not been completed -- almost three years later. Petition at 7-9 and n.6.

The plan consultations ordered by the Ninth Circuit are no exception. Initiated August 3, 1994, neither consultation was completed as of late February, 1995.[8]

Federal agencies treat the section 7 consultation process as secret and closed to the public. *See* 50 C.F.R. § 402.14(g) (describing NMFS/FWS refusal to open the process to citizens). In the two pending plan consultations, the contract holders are excluded from the process, even though their contract rights are at stake.[9] The process is so secretive that the contract holders are unable to find out what subjects are being discussed, what issues are being considered or, for that matter, when the process might end.

The timber sale contract holders -- and the forests themselves -- are thus left in a precarious position. Each contract is legally binding on the government, each contract has a fixed duration, and each contract has an intended benefit of preserving the ecological health of the forest. Yet the contract holders are denied the benefits of the timber promised in each contract, the forests are denied the protection and enhancement intended in each contract, and the contracts remain suspended, until some unknown time in the future when the plan consultations are completed and the current injunction may be lifted.

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[8] The Solicitor General's petition suggests the plan consultations may conclude in March 1995, some three months after the statutory deadline. Petition at 30 n.22.

[9] Some contract holders asked the Forest Service to allow them to participate in the plan consultations as "permit applicants" under 16 U.S.C. § 1536(b), but all these requests were denied.

REASONS FOR GRANTING THE PETITION

The decision below profoundly changes public land management throughout the west by (1) requiring automatic injunctions for procedural violations of the ESA without any showing of harm to wildlife, (2) judicially enforcing non-binding ESA regulations and (3) frustrating Congressional land management goals by burdening federal land management and wildlife agencies with repeated, protracted and unproductive consultations that do not protect wildlife.

A. The decision below reaffirms and expands errant Ninth Circuit law mandating automatic injunctions for procedural violations of the ESA, contrary to prior rulings of this Court.

This Court expressly rejected the Ninth Circuit's "automatic injunction" rule in environmental cases in *AMOCO Production Co. v. Gambell*, 480 U.S. 531 (1987). In *AMOCO*, the Court reversed the Ninth Circuit's presumption that a procedural violation of an environmental law automatically requires injunctive relief as "contrary to traditional equitable principles." *Id.* at 545. The Court observed that "the Ninth Circuit erroneously focused on the statutory procedure rather than on the underlying substantive policy the process was designed to effect . . . ." *Id.* at 544.

Despite this Court's rejection of the doctrine, the Ninth Circuit has continued to apply the automatic injunction rule to procedural violations of the ESA. The decision below represents at least the fourth case since *AMOCO* where the Ninth Circuit has granted an automatic injunction based on a purely procedural violation of the ESA.

The Ninth Circuit's ESA automatic injunction rule first appeared in *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985), where the court enjoined a project for failure to conduct section 7 consultation, with no showing that the procedural violation threatened any irreparable harm to the environment. The court ruled that "[g]iven a substantial procedural violation of the ESA in connection with a federal project, **the remedy must be an injunction of the project pending compliance with the ESA**." *Id.* at 764 (emphasis added).

The ruling was based on *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1250 (9th Cir. 1984). *Thomas*, 753 F.2d at 764 ("We see no reason that the same principle [as in *Save Our Ecosystems*] should not apply to procedural violations of the ESA.") In *AMOCO*, this Court cited *Save Our Ecosystems* as the source of the injunction rule it rejected in that case. *AMOCO*, 480 U.S. at 541.

Immediately after *AMOCO*, however, the Ninth Circuit reaffirmed the ESA automatic injunction rule notwithstanding this Court's explicit disapproval of the *Save Our Ecosystems* doctrine on which it was based. *Sierra Club v. Marsh*, 816 F.2d 1376, 1384 (9th Cir. 1987). Indeed, the Ninth Circuit concluded that *AMOCO* "appears implicitly to affirm *Thomas*." *Id.* With no finding of irreparable harm, the court enjoined a project based on a purely procedural violation of the ESA. *Sierra Club v. Marsh*, 816 F.2d at 1383-84.

Thereafter the Ninth Circuit issued automatic injunctions for procedural ESA violations, with no finding of irreparable harm, in *Conner v. Burford*, 848 F.2d 1441, 1445 (9th Cir.

1988), in *Lane County Audubon Society v. Jamison*, 958 F.2d at 294 and, most recently, in this case. App. 14a-16a.

The decade since the first Ninth Circuit automatic ESA injunction case has seen a vast expansion of the doctrine by the Ninth Circuit, most noticeably in *Lane County Audubon* and the decision below.

Thomas and *Sierra Club* involved the failure to consult on a single project, and both cases enjoined the project, with no finding of harm to a protected species. *Conner* expanded the doctrine to automatically enjoin a series of related oil and gas leases due to incomplete consultation, with no finding of harm to a species.

Lane County substantially expanded the doctrine to automatically enjoin related **projects** due to lack of consultation on a governing management **plan**, with no finding of harm to a species. The decision below in this case further expanded the doctrine to automatically enjoin unrelated projects due to lack of consultation on a governing plan, with no finding of harm to a species, and where the only evidence was the Forest Service's finding that each enjoined project is "not likely to adversely affect" the species in question. App. 5a.

The effect of these decisions is to recreate under ESA the very same automatic injunction rule this Court rejected in *AMOCO*. As the district court stated below: "The Ninth Circuit has held that the traditional sliding scale test for preliminary injunctions, weighing harms against the likelihood of success on the merits, is inapplicable for injunctions sought under the ESA." App. 41a-42a.

The Phoenix-like reemergence of the Ninth Circuit automatic injunction rule is contrary to this Court's decision not only in *AMOCO* but also in *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982). The latest incarnation of the rule implicates the very same legal error identified in both cases: it "focuse[s] on the statutory procedure rather than on the underlying substantive policy the process was designed to effect." *AMOCO*, 480 U.S. at 544; *Romero-Barcelo*, 456 U.S. at 314-15.

In this case the Forest Service determined that each enjoined project is "not likely to adversely affect" the protected salmon stocks. Pacific Rivers Council never challenged these findings, and the district court and court of appeals below accepted these findings. App. 5a.

Yet with no finding of irreparable harm to the salmon stocks, and no weighing of competing harms, the court below mandated an automatic injunction against all "may affect" projects, even though all the projects were judged "not likely to adversely affect" the salmon stocks.[10]

The court's refusal to balance the harms in this case -- its refusal to consider the actual effects of the injunction it granted -- is particularly short-sighted, and potentially destructive to the environment, in light of the expert testimony offered by Intervenors that the injunction itself threatens irreparable harm to the long-term ecological health of the forests that are the subject of the case. No principle of

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[10] The Forest Service had voluntarily suspended all pending projects that were judged "likely to adversely affect" the salmon stocks, and those were not at issue in the case. App. 4a-5a.

equity requires a court to blind itself to the results of its actions, absent the most compelling evidence that Congress intended such a self-destructive result.

The evidence of such irrational Congressional intent is lacking here. The only cited source for the Ninth Circuit rule is this Court's decision in *TVA v. Hill*, 437 U.S. 153 (1977), which identifies neither Congressional intent to disregard the effects of injunctive relief for procedural violations of the ESA, nor intent to automatically remedy every procedural violation of the ESA with an injunction.

Hill did not address this question. That case involved a violation of the ESA's primary substantive policy direction to avoid jeopardy to protected species, since "it was conceded that completion of the dam would destroy the critical habitat of the snail darter." *AMOCO*, 480 U.S. at 543 n.9. This Court never ruled that a purely procedural violation of the ESA automatically demands an injunctive remedy even when there is no impact on a species. *AMOCO* and *Romero-Barcelo* seem to command the contrary result.

This court should issue the writ of certiorari in this case to give the Ninth Circuit's revived automatic injunction rule the interment it should have received after *AMOCO*.

B. The decision below judicially enforces NMFS/FWS consultation regulations that are not binding on the Forest Service or other federal agencies.

To compound the error of the automatic injunction issued by the court below, the injunction also enforced against the Forest Service the NMFS/FWS joint consultation regulations that are not binding on that agency.

While the ESA merely prescribes "consultation with . . . the Secretary" as a tool to help federal agencies avoid jeopardy to protected species, 16 U.S.C. § 1536(a)(2), the NMFS/FWS joint consultation regulations go far beyond the statute to define in great detail when consultation is required, what specific consultative steps are necessary, and how consultation is to occur. 50 C.F.R. Part 402. These regulations take up eleven full pages of the Code of Federal Regulations. *Id.*

Most significantly, the regulations purport to require federal agencies to consult with NMFS or FWS (or both) on any proposed action that "may affect" a protected species. 50 C.F.R. § 402.14(a). This consultation must be "formal," *id.*, unless NMFS or FWS officially concur that an action is "not likely to adversely affect" the protected species. 50 C.F.R. § 402.14(b). The "may affect" consultation standard has the effect of commanding consultation on many minor projects where there is no plausible risk of jeopardy to a protected species.

This Court had occasion to consider these same regulations in *Lujan v. Defenders of Wildlife*,-- U.S. --, 112 S. Ct. 2130 (1992), a case ultimately involving standing to sue. In that case the Solicitor General advised this Court that the NMFS/FWS consultation regulations are not binding on federal action agencies such as the Forest Service:

> When the Secretary promulgated the regulation at issue here, he thought it was binding on the agencies . . . . The Solicitor General, however, has repudiated that position here,

> and the agencies themselves apparently deny the Secretary's authority. . . .

112 S. Ct. at 2141.

For that reason, four members of this Court believed that a suit seeking to expand the joint regulations to require consultation on foreign projects was not likely to redress an agency's failure to consult on such a foreign project. *Id.* at 2140 (Opinion of Justice Scalia in which the Chief Justice, Justice White and Justice Thomas joined).

Contrary to the government's position in *Defenders of Wildlife*, the court below held the consultation regulations binding on the Forest Service:

> . . . the ESA and its implementing regulations require federal agencies ("action agencies") to consult with the appropriate federal fish and wildlife agency -- NMFS, in this case -- when their actions "may affect" an endangered or threatened species. *See* 50 C.F.R. § 402.14(a). . . .

App. 9a n.8. Having incorrectly held the consultation regulations binding on action agencies like the Forest Service, the court below then proceeded to judicially enforce against the Forest Service the "may affect" consultation requirement -- which only appears in the regulations -- by holding that consultation is required because "the LRMPs are actions that **'may affect'** the protected salmon," App. 12a (emphasis added), by enjoining "ongoing and announced activities that **may affect** the Snake River chinook," App. 14a, 15a (emphasis added), and by ruling that "[t]he Forest

Service **cannot go forward with these activities** without first complying with the consultation requirements of the ESA." App. 16a (emphasis added).[11]

Similar judicial enforcement of the "may affect" consultation regulation also occurred in the Ninth Circuit's earlier *Lane County Audubon* decision. *Lane County Audubon*, 958 F.2d at 294.

These rulings convert the "non-binding" NMFS/FWS consultation regulations into judicially enforceable mandates against the Forest Service and other federal agencies. Coupled with the Ninth Circuit automatic injunction rule, judicial enforcement of the consultation regulations deprives agencies of needed statutory discretion to comply with the ESA, allows the courts to exercise broad supervisory power over ESA compliance that was never intended by Congress, and gives a powerful tool to those private interests that desire to use litigation over agency procedures to delay and frustrate multiple-use land management in the west.

The net result of the decision below is to compel every federal agency to satisfy the most trivial detail of the non-binding consultation procedures, on pain of an automatic court injunction -- even where, as here, the action agency and the wildlife agency agree that the non-binding procedure mandated by the court is unnecessary, C.R. 86, Exhibit 7, and there is no proven link between the non-binding procedure and the substantive wildlife policy adopted by Congress.

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[11] The court also relied on the regulations' definition of "agency action" in determining that a land and resource management plan is an action requiring consultation. App. 10a.

This court should issue a writ of certiorari to review this errant decision enforcing these non-binding regulations.

C. The decision below frustrates Congressional land management goals by burdening public land management in the west with repeated, protracted and unproductive consultation procedures that will substantially interfere with multiple-use land management and will add no protection to wildlife.

Intervenors cannot overstate the actual impact of the decision below. By mandating a complete halt to all "may affect" projects on an entire national forest every time a locally-present species is added to the threatened and endangered list, the decision below is likely to frustrate every existing Congressional policy on land management in the west by creating an unending bureaucratic gridlock. The result will be to end multiple-use land management as it has been known.

The first element in this formula for bureaucratic paralysis is the intention of the wildlife agencies to accelerate the number of new species listings in the next few years. *See* "Democrats Get Snared By GOP Pact on List Of Endangered Species," Wall Street Journal, February 17, 1995, page A1 (agency agreement to propose 382 new species listings by 1996). Thus, in the near future it can be expected that several new species listings will occur each **month** in the western states.

The second element is the seemingly uncontrollable duration of ESA consultations. As noted above, most consultations take many months; some take as much as several years. Statutory deadlines are routinely ignored.

The third element is the mandated designation of critical habitat for a listed species, which typically occurs one to three years after a species is listed.[12] Once critical habitat is designated, a new round of ESA consultations occurs since the ESA's duty for federal agencies to avoid adverse modification to critical habitat is independent of their duty to avoid jeopardy to listed species. 16 U.S.C. § 1536(a)(2). Even if consultation on the newly-listed species has just been completed, an entirely new consultation must follow the same tortuous regulatory route once critical habitat for the species is designated.

The decision below adds the final element to this paralytic compound. If every new species listing on a national forest triggers an LRMP consultation, as the court below held, and if all projects that "may affect" the newly-listed species must be halted until the plan consultation is completed, as the court below also held, then land management agencies will never escape the continuous loop of consultation and injunction.

Since each plan consultation lasts months or years, and since once critical habitat is designated for the newly listed species, the whole consultation procedure must repeat itself -- no doubt, as species advocates are sure to argue, with another automatic halt in ongoing projects, and since the entire multi-step process must be repeated again for each of the hundreds of species waiting to be listed, it is doubtful that any multiple-use resource plan for an area of public land in the west will ever again be implemented.

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[12] *See* 16 U.S.C. § 1533; *Northern Spotted Owl v. Lujan*, 758 F. Supp. 761 (W.D. Wash. 1991).

Yet Congress has mandated that the national forests (and most Bureau of Land Management ("BLM") lands) are to be managed for the multiple use and sustained yield of resources including timber, grazing, mining and other commodities. 16 U.S.C. § 528, § 1604(e) (national forests); 43 U.S.C. § 1701(a)(7), § 1702(c) (BLM lands). Nothing in the ESA repealed these laws. Nonetheless, the decision below is likely in practice to end multiple-use sustained-yield management of public lands as Congress intended it, at least in the western states that are subject to the jurisdiction of the Ninth Circuit.

Such a clear frustration of the Congressional intent expressed in the land management laws would require unequivocal legislative endorsement even if it could be shown that this result is unavoidable in order to further the substantive wildlife protection goals of the ESA. This frustration of Congressional intent is plainly contrary to law where, as here, no legislative endorsement exists, no impact on species has been shown and the expert land management agency and the expert wildlife agency agree that the court-ordered consultation is unnecessary and unproductive. C.R. 86, Exhibit 7.

To avoid this unacceptable frustration of Congressional land management policies, this Court should issue a writ of certiorari to review the decision below.

CONCLUSION

The Court should issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

Dated this 24th day of February, 1995.

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NO. 94-1332

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JACK WARD THOMAS, CHIEF,
UNITED STATES FOREST SERVICE, *ET AL.*,

Petitioners,

v.

PACIFIC RIVERS COUNCIL, *ET AL.*,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

The following questions presented correspond more accurately than those in the petition to the record before and the decision of the court of appeals.

1. Whether the Forest Service had to reinitiate consultation on two forest plans upon the listing of the Snake River chinook in addition to promising consultations on future plan amendments and site-specific activities, where the Forest Service was proceeding with forest plan activities that could adversely affect the salmon prior to completing any form of consultation?

2. Did the court of appeals err in remanding the case to the district court to determine whether to enjoin, during the forest plan consultation process, various forest activities that may adversely affect the newly listed Snake River chinook?

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should deny the petition for a writ of certiorari because subsequent developments have rendered the case moot. This case sought consultation on the Umatilla and Wallowa-Whitman Land and Resource Management Plans (LRMPs or forest plans), and those consultations are now complete. The questions presented by the petition are so intertwined with the specific facts of this case that they are unlikely to recur. Review by this Court would offer little or no guidance to lower courts addressing potential future cases.

To compound matters, the petition's second question was neither presented to nor decided by the court of appeals and is still percolating through the lower courts on remand. It is premature and unnecessary for this Court to offer its views on the issue.

Justiciability defects aside, this case does not warrant review. In the courts below, the Forest Service admitted the need to revise its LRMPs and to consult on the effects of its ongoing activities on the newly listed salmon. Nonetheless, the agency went forward with numerous projects that it admitted could adversely affect the fish before completing any revisions or consultations. Because no other consultations had yet taken place, the forest plan consultation required by the court of appeals was neither duplicative nor meaningless.

The court of appeals' decision is well grounded in the applicable statute, the regulations and practice of the federal agencies charged with implementing the statute, and prior case law. In the end, the forest plan consultation assessed actions that the expert agency found critical to the salmon's survival, but that escaped review in other consultations. In light of these factors, the petition should be denied.

REGULATORY PROVISION INVOLVED

50 C.F.R. § 402.16 is reprinted at App., *infra*, 1a.

STATEMENT OF THE CASE

After reviewing the relevant statutory and regulatory provisions, this statement describes the posture of the case as it was presented to the court of appeals and as it has evolved since the court of appeals' decision.

I. THE ESA REQUIRES THE INPUT OF THE EXPERT FISH AND WILDLIFE AGENCY BEFORE POTENTIALLY HARMFUL ACTIVITIES MAY PROCEED.

This case involves the consultation process mandated by Section 7(a)(2) of the Endangered Species Act of 1973 (ESA), 16 U.S.C. § 1536(a)(2). The core feature of that process is that it ends only when the expert fish and wildlife agency completes its evaluation and provides its views to the action agency.

Section 7(a)(2) requires that every federal agency "shall, *in consultation with and with the assistance of the Secretary*, insure

that any action authorized, funded or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species...." 16 U.S.C. § 1536(a)(2) (emphasis added).[1] The expert fish and wildlife agencies play a central role in this process by issuing the biological opinions that conclude the consultation. 16 U.S.C. § 1536(b). If NMFS or the FWS concludes that an action is likely to jeopardize a listed species, it must suggest reasonable and prudent alternatives that would avoid that result. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h). If no jeopardy is found, NMFS or the FWS must still impose reasonable and prudent measures to minimize the incidental take of listed species and may suggest conservation measures to assist the action agency in reducing or eliminating impacts to the species. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(g)(6)-(7).

NMFS and the FWS have adopted joint regulations elaborating on the ESA consultation process. *See* 50 C.F.R. Part 402. The regulations require that "[e]ach federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat." 50 C.F.R. § 402.14(a). If the agency determines that its action "may affect" the listed species, it must normally undertake formal consultation with NMFS or the FWS. *Id.* The regulations reiterate that this consultation concludes with the issuance of a biological opinion by NMFS or the FWS to the action agency. 50 C.F.R. § 402.02 (definition of "formal consultation").

Under certain circumstances, the regulations permit an agency to proceed with informal consultation. 50 C.F.R. §§ 402.13(a), 402.14(b)(1). Informal consultation commences when an agency determines that its action is "not likely to adversely affect" a listed species and concludes only when NMFS or the FWS concurs, in writing, with this determination. *Id.* If NMFS or the FWS does not concur, then the action must undergo formal consultation. 50 C.F.R. § 402.14(a).

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[1] The Secretaries of the Interior and Commerce, which share responsibility for implementing the ESA, have delegated their ESA authorities to the United States Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS), respectively.

In short, the consultation process prescribed by the statute and the regulations is a closed loop, ending only when the expert fish and wildlife agency provides its assessment of the effects of an agency action. The Forest Service cannot discharge the consultation obligation on its own. It must obtain either a biological opinion or the expert agency's written concurrence in a "not likely to adversely affect determination."

One key regulation, 50 C.F.R. § 402.16, overlooked almost entirely by the petition, prescribes when consultation must be reinitiated for an ongoing or continuing action:

> Reinitiation of formal consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and:
>
> . . .
>
> (d) If a new species is listed or critical habitat designated that may be affected by the identified action.

In biological opinions on other LRMPs, the FWS has noted that this regulation requires reinitiation of consultation when a new species is listed that may be affected by the forest plan. *E.g.*, Amendment to Biological Opinion on Flathead National Forest Plan and Amendments at 31 (July 18, 1989) ("Flathead BO").

II. THE FOREST SERVICE HAD COMPLETED ALMOST NO CONSULTATIONS ON FOREST ACTIVITIES AT THE TIME THE COURT OF APPEALS RULED.

A. *Forest Plan Decisions May Adversely Affect Endangered Salmon.*

Under the National Forest Management Act (NFMA), 16 U.S.C. § 1600 *et seq.*, the Forest Service must "develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System." 16 U.S.C. § 1604(a). These LRMPs "establish management

standards and guidelines [and] determine resource management practices, levels of resource production and management, and the availability and suitability of lands for resource management." 36 C.F.R. § 219.1(b). Each LRMP establishes the rules for managing a particular forest for up to 15 years, 16 U.S.C. § 1604(f)(5), and must provide adequate direction to ensure the viability of species, particularly endangered and threatened species, protect plant and animal diversity, and conserve soil and water resources. 16 U.S.C. § 1604(g)(3); 36 C.F.R. § 219.27.

Each LRMP makes three basic decisions that have continuing effects on the management of forest resources. First, the LRMP divides forest lands into management areas that protect or promote different uses of forest resources. The LRMP opens some lands to logging and grazing and places others in wilderness or other protective regimes. 16 U.S.C. § 1604(g)(2)(A), (k). For example, prior to listing of the Snake River chinook, the Wallowa-Whitman LRMP allocated less than 60,000 acres to "anadromous fish emphasis," which constrains logging, grazing, and road-building, and over 700,000 acres to management primarily for timber production. Gov't Excerpt of Record (ER) 84A at 4-56, 4-94.

Second, the plans set goals for production of various forest commodities. The LRMPs project timber volumes and livestock forage levels for each year of the plan's life and schedule specific logging, grazing, and road-building activities to meet these goals. *Id.* at 4-5 & App. A, C.

Third, the plans establish forest-wide and management area standards and guidelines that regulate the manner in which logging, grazing, and other activities will be conducted. Among other objectives, the standards and guidelines protect habitat needed to ensure species' viability and diversity. *Id.* at 4-22 (aquatic habitat and water quality protection); 16 U.S.C. § 1604(g)(3); 36 C.F.R. 219.27.

All site-specific activities in the forest must comply with the LRMP. 16 U.S.C. § 1604(i). Decisions made in the LRMP generally are not revisited at the project level. *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1516 (9th Cir. 1992). Instead, the core decision at the project level is whether the action is consistent with the forest plan and achieves forest plan goals.

The Forest Service adopted LRMPs for the Umatilla and Wallowa-Whitman National Forests in 1990. At that time, the Forest Service consulted with the FWS regarding the plans' effects on threatened bald eagles and peregrine falcons.

Two years after adoption of the LRMPs, NMFS added the Snake River spring/summer chinook salmon to the list of threatened species. 57 Fed. Reg. 14653 (Apr. 22, 1992).[2] The Forest Service acknowledges that it must consult with NMFS on the effects of its ongoing projects on the chinook. Petition at 17 n.12. Throughout this case, the agency also "has recognized that adjustments to the forest plans to address the newly listed species are warranted." Brief for the Appellees at 19 (9th Cir. Feb. 16, 1994).

B. *The Forest Service Proceeded With Potentially Harmful Activities Without Completing Any Consultations With NMFS.*

In its petition, the Forest Service provides a laundry list of actions which, it contends, make consultations on the existing LRMPs unnecessary and duplicative. Virtually none of these actions had been implemented or received NMFS approval prior to the court of appeals' decision. Rather, the Forest Service continued with logging, grazing, and road building projects under the outdated direction of the existing LRMPs without obtaining NMFS' opinions on how to modify the plans or the projects to ameliorate their adverse effects on the endangered salmon.

For example, the Forest Service raises its proposal to develop conservation strategies for the 11 major anadromous watersheds in the Umatilla and Wallowa-Whitman National Forests and to consult with NMFS on the completed strategies. Petition at 8, 22 n.16. The Forest Service notes that it completed a prototype strategy for one watershed in October 1992. *Id.* However, the agency has neither adopted nor ever obtained

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[2] NMFS since has published an interim emergency rule reclassifying the chinook as endangered, 59 Fed. Reg. 42529 (Aug. 18, 1994), and a proposed rule to make this reclassification permanent, due to continued, dramatic population declines. 59 Fed. Reg. 66784 (Dec. 28, 1994).

NMFS' assessment of *any* watershed conservation strategy, including the prototype.

The Forest Service also notes its development of an interim strategy, known as PACFISH, for managing anadromous watersheds in the interior Columbia Basin. *Id.* at 22-23 & n.16.[3] Again, at the time the court of appeals ruled, the Forest Service had not adopted or completed consultation on this strategy and had not committed to taking these steps by a date certain. Nor had the Forest Service assured the court or the parties that PACFISH would address all inadequacies in the existing LRMPs.

The agency further emphasizes that it was consulting on site-specific projects taking place pursuant to the LRMPs, either individually or grouped by watershed. Petition at 21 n.16. This is only half the story. For the vast majority of ongoing and announced projects — those that the Forest Service determined were "not likely to adversely affect" the salmon (NLAA projects) — the agency did not wait for NMFS' biological opinion or written concurrence before proceeding. As of July 1993, the forests had completed at least 20 timber sales and 10 new roads and continued their grazing programs without completing *any* consultation with NMFS on those projects, even though the Forest Service had determined these activities could affect listed salmon. Pet. App. 6a n.6.. Since NMFS' concurrence is required to conclude the consultation process, 50 C.F.R. §§ 402.13(a), 402.14(b)(1), the Forest Service's unilateral designations did not discharge its duty to consult with NMFS on those projects.

The Forest Service continued this practice even after NMFS disagreed with several of its "not likely to adversely affect" determinations. *See* LRMP BO at 40 (tabulating NMFS

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[3] PACFISH adds interim salmon protections to the existing LRMPs while the Forest Service develops two longer-term ecosystem management plans for the Columbia Basin. The Forest Service presently projects that it will complete the longer-term plans in mid-1996. The Forest Service did not adopt PACFISH until February 24, 1995. *See* 60 Fed. Reg. 11655 (Mar. 2, 1995).

disagreement with NLAA determinations).[4] For example, although the Tucannon Biological Opinion called for wide riparian buffers and other mitigation measures for timber sales, units logged prior to the completion of consultation did not incorporate these protections. PRC ER 128 at 25 (units logged prior to the biological opinion did not insure adequate shade, sediment reduction, or recruitment of large woody debris).[5] Similarly, the Forest Service determined that 11 timber sales in the Grande Ronde basin were "not likely to adversely affect" the salmon. When NMFS reviewed the sales, it concluded that significant modifications were necessary to avoid harm to the fish. PRC ER 107 at 6, 26-31.

In other words, during the pendency of this case, the Forest Service routinely proceeded with site-specific actions based on the outdated LRMP standards and guidelines even though these prescriptions had never been assessed through the consultation process. As NMFS explained in the LRMP BO at 43-44:

> [S]ite-specific actions are still being developed using outdated management direction contained in the LRMPs. Prior site-specific consultations have made clear that site-specific actions that are consistent with the existing plans may lead to adverse effects on the listed salmon and their critical habitat.

In short, at the time the court of appeals ruled, the Forest Service was implementing numerous projects that could adversely affect listed salmon under the admittedly inadequate LRMPs and

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[4] Pacific Rivers Council, *et al.* (PRC) has lodged with the clerk of the Court copies of the Biological Opinion on Land and Resource Management Plans for the Boise, Challis, Nez Perce, Payette, Salmon, Sawtooth, Umatilla, and Wallowa-Whitman National Forests (LRMP BO) and the PACFISH Biological Opinion.

[5] At the time of the appeals court ruling, the Forest Service had received only two biological opinions from NMFS, one on ongoing activities in the Tucannon watershed of the Umatilla National Forest and one on 11 proposed timber sales in the Grande Ronde watershed of the Wallowa-Whitman National Forest.

had been doing so for over two years without completing *any* consultations with NMFS on the projects, the plans, or any promised amendments to the plans.

III. THE DECISION BELOW DID NOT REQUIRE DUPLICATIVE CONSULTATIONS OR AN INJUNCTION BARRING PROJECTS DURING CONSULTATION.

The district court held that the Forest Service violated the ESA by failing to consult on the Umatilla and Wallowa-Whitman LRMPs. Pet. App. 40a-41a. Relying on ESA § 7(d), 16 U.S.C. § 1536(d), the court refused to enjoin ongoing and announced projects under the plans that the Forest Service had determined "may effect," but were "not likely to adversely affect," the endangered salmon. *Id.* at 43a-44a.[6]

The court of appeals affirmed the district court's judgment that the Forest Service must reinitiate consultation with NMFS on the LRMPs. *Id.* at 16a. The court of appeals reasoned that consultation on the LRMPs would not be superfluous because the promised plan amendments, which were never presented to the court, would not necessarily revise all aspects of the LRMPs that may adversely affect the salmon. *Id.* at 13a n.12.

The court of appeals disagreed with the district court's conclusion that ongoing timber, range, and road projects that "may affect" the salmon could proceed *before* the Forest Service reinitiated consultation on the forest plans, *id.* at 14a:

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[6] ESA § 7(d) provides:

> *After* initiation of consultation required under [§ 7(a)(2)], the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate [§ 7(a)(2)]. (emphasis added).

> As the ESA's plain language makes clear, § 7(d) applies only after an agency has initiated consultation under § 7(a)(2). As detailed above, the Forest Service has, as yet, failed to enter into consultation on the *LRMPs*.... (emphasis in original).

The court's decision expressly did "not preclude the district court from considering further modifications to its injunction, in accordance with our opinion, if and when consultation is reinitiated." *Id.* at 17a. Rather than decide what activities must be enjoined during the consultation period, the court remanded to the district court to determine in the first instance "if the ongoing or announced activities can proceed during the consultation period." *Id.* at 16a.

IV. SUBSEQUENT DEVELOPMENTS HAVE RENDERED THE CASE MOOT AND HAVE DEMONSTRATED THE VALUE OF FOREST PLAN CONSULTATIONS.

A. *Subsequent Judicial Proceedings*

The Forest Service reinitiated consultation with NMFS on the Umatilla and Wallowa-Whitman LRMPs on August 3, 1994, and PRC moved the district court for an injunction barring all "may affect" timber, range, and road projects until completion of the consultation. The Forest Service argued that reinitiation of consultation obviated the need for any injunction and that the court of appeals' opinion did not require otherwise. The Forest Service also submitted a stack of "§ 7(d) determinations" to the district court, purporting to show that the NLAA projects would not constitute an irreversible or irretrievable commitment of resources that would foreclose any reasonable and prudent alternative to protect the salmon.

On October 20, 1994, the district court enjoined all timber cutting and road construction activities and all "likely to adversely affect" grazing and timber removal until completion of consultation. The district court allowed NLAA grazing and removal of downed timber to continue based on its independent conclusion that these activities did not constitute an irreversible or

irretrievable commitment of resources. Pet. App. 58a-59a. The court declined to enjoin these activities despite its finding that the agency's record was sorely lacking; the court called the agency's "§ 7(d) determinations" "boilerplate," "conclusory," "devoid of actual site-specific analysis," and only "possible through the relatively modern advent of word processors." *Id.* at 57a. PRC, the Forest Service, and respondent Northwest Forest Resource Council, *et al.* (NFRC) appealed from the district court's opinion. Those appeals are currently pending.

In a companion case in Idaho, the district court framed its injunction in different terms. *Pacific Rivers Council v. Thomas*, 873 F. Supp. 365 (D. Idaho 1995) (*PRC Idaho*). The district court preliminarily enjoined all "may affect" logging, grazing, mining, and road projects in six national forests providing habitat for the endangered salmon until the Forest Service completed consultation on the LRMPs. However, the court invited the Forest Service to supplement the record and move for a modification of the injunction, *id.* at 372:

> Projects identified as "not likely to adversely affect" may be presented by motion or motions of the parties to the court for review to determine if they may proceed under § 7(d) pending completion of consultation under § 7(a)(2).

The Idaho district court subsequently stayed its injunction until March 15, 1995 to allow the Forest Service to complete consultation on the LRMPs. *PRC Idaho*, No. 94-0159-S-DAE (Jan. 25, 1995) (order staying injunction) (Lodged with the Clerk). The Forest Service and several intervenors have appealed from the district court's preliminary injunction. Those appeals are currently pending.

B. *The PACFISH And LRMP Biological Opinions*

On January 23, 1995, before this petition was filed, NMFS signed a biological opinion on the long-anticipated PACFISH strategy. NMFS specifically noted that consultation on PACFISH was not a substitute for consultation on the LRMPs:

> NMFS believes that section 7 consultations may be both required and appropriate at several levels [sic] this planning process, where such planning actions identify elements (e.g., standards and guidelines, management objectives and goals, land use allocations, etc., as well as actual ground-disturbing actions) that may affect listed species or designated critical habitat. Consultation on PACFISH is one of several consultations on the various components of land-use planning either completed or underway....

PACFISH BO at 24. Although PACFISH revised the LRMP standards and guidelines for activities within riparian areas, it did not alter the LRMP land allocations or commodity output goals or the standards for upland activities that may affect the salmon's habitat. NMFS identified a range of critical issues not addressed in PACFISH that would be addressed in the LRMP consultation. *Id.* at 13, 20, 22, 25, 27, 29, 31 (*e.g.*, designation of key watersheds requiring enhanced protection and restrictions on activities outside of riparian areas).

NFMS concluded that PACFISH was not likely to jeopardize the endangered chinook "in part on the assumption that some of the adverse effects from interrelated actions not prohibited by PACFISH will be addressed in consultation on the LRMPs." *Id.* at 33. NMFS directed the Forest Service to reinitiate consultation on PACFISH if the LRMP consultation was not finished by March 1, 1995, underscoring the inadequacy of the PACFISH consultation standing alone. *Id.*

On March 1, 1995, NMFS issued a 92-page biological opinion on the Umatilla and Wallowa-Whitman LRMPs and the six LRMPs at issue in the Idaho case. Like the PACFISH Biological Opinion, the LRMP opinion finds that:

> to help prevent extinction and promote the recovery of listed salmon, the [Forest Service] must consider both the immediate, localized effects of site-specific actions ... and the broad aggregated incremental effects to the species and its habitat. This latter factor may be best addressed in a plan-level analysis of the species' biological requirements across its range.

LRMP BO at 15; *see also id.* at 44, 45 ("Consideration of the needs of listed salmon is important at both levels of forest activity decisionmaking.") The opinion further concludes that "plan level consultation may reduce adverse effects at the site-specific level and increase agency efficiency by considering programmatic issues, identifying common characteristics of site-specific actions and evaluating potentially cumulative effects of numerous site-specific activities at the earliest opportunity." *Id.* at 14; *see also id.* at 65.

The LRMP Biological Opinion reiterates that the PACFISH consultation did not eliminate the need to consult on the entire plans: "Even though PACFISH substantially improves many of the standards and guidelines in the LRMPs, a comprehensive landscape-scale conservation strategy is still lacking." *Id.* at 45. PACFISH did not resolve conflicts between salmon protection and LRMP land allocations and commodity output goals. *Id.* at 45-46 ("Conflict between resource protection and outputs may continue even after adjustments required by PACFISH, if other resource areas are not adjusted to reflect requirements of anadromous fish.") These issues were necessarily addressed in the LRMP consultation. *E.g.*, *id.* at 73, 90 (establishing criteria for designation of priority watersheds and long-term adjustment of land allocations and output goals).

THE PETITION SHOULD BE DENIED

I. THE CASE IS MOOT.

The petition should be denied because the case has become moot. PRC filed this suit to compel the Forest Service to reinitiate consultation on its LRMPS and to halt projects during the consultation process that could harm the endangered Snake River chinook. NMFS has issued a biological opinion on the effects of the LRMPs, completing the consultation sought by PRC and ordered by the courts. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.02. The injunction entered by the district court on remand has expired by its own terms, Pet. App. 60a; the Idaho court also has terminated its injunction. *PRC Idaho*, No. 94-0159-S-DAE (Mar. 8, 1995) (order dissolving injunction).

No live case or controversy remains between the parties. It does not matter that the Forest Service engaged in consultation

pursuant to a court order. Because the agency cannot undo its compliance and cannot return to its pre-consultation position, the case is moot. *Cf. Norfolk & Western Ry. v. American Train Dispatchers*, 499 U.S. 117, 111 S.Ct. 1156, 1163 n.3 (1991) (case not moot because petitioner was willing and able to resume its prior conduct if it prevailed in this Court); *Bakery Sales Drivers Local Union No. 33 v. Wagshal*, 333 U.S. 437 (1948) (same). As this Court has stated, "if an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed." *Church of Scientology v. United States*, - U.S. -, 113 S.Ct. 447, 449 (1992) (citations omitted).

Recognizing the mootness of this case, the petition asserts that the dispute is capable of repetition yet evading review. Petition at 30 n.22. This Court recognizes a narrow exception to the mootness doctrine where the controversy is likely to recur between the same parties. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 481 (1990); *Lane v. Williams*, 455 U.S. 624, 634 (1982). PRC is no longer aggrieved, and forcing it to litigate a case on behalf of unknown future parties is inconsistent with the strictures of Article III. *Lane*, 455 U.S. at 634; *Honig v. Doe*, 484 U.S. 305, 317 (1988); *id.* at 332-33 (Scalia, J., dissenting).

Moreover, the issues presented in the petition are so narrow and fact-specific that they are unlikely to recur and are poorly suited to generic review. The petition concedes that the Forest Service regularly consults on the adoption, amendment, and revision of forest plans and must consult on site-specific forest activities. Petition at I, 15-16. The Forest Service does not object to consulting on the LRMPs themselves. *Id.* & 16 n.10. Rather, the agency's objection is to consultation on the LRMPs "in addition" to consultations on plan amendments and site-specific activities. *Id.* at I.

The case framed by petitioners is virtually certain *not* to recur. The next time a species is listed, the Forest Service may not amend its LRMPs. Similarly, the agency is not apt to adopt conservation strategies as a matter of course for newly listed species, especially given its failure to complete such strategies here. Watershed consultations are uniquely suited to fish and would have little utility for other listed species. Moreover, given

that NMFS ultimately concluded that the LRMP consultation was essential to assess the full effects of Forest Service plans on the newly listed salmon, NMFS' staff is unlikely to state in the future that plan consultations are unnecessary. *See id.* at 9-10.

The next time around, consultation on the LRMPs may be the only means of assessing the cumulative effects of forest activities on newly listed species. In *Silver v. Thomas*, Civ. No. 94-127712-5 (D. Ariz.), cited in the Petition at 30, the Forest Service is developing plan amendments to protect the threatened Mexican spotted owl, but has declared no intent to consult on either the amendments or the plans.[7] LRMP consultations would not be "in addition" to anything in that case and would advance the goals of ecosystem management espoused by the Forest Service. Petition at 20, 22-23.

This dispute also is unlikely to recur because the consultation required for newly listed species will rarely be as extensive as that needed for endangered salmon. The Forest Service asserts that the dispute will recur simply because many species are candidates for listing. *Id.* at 29. However, over 50% of the candidate species are located only in Hawaii or overseas where there are no national forests or Bureau of Land Management (BLM) lands. Many of the other candidate species have no habitat on national forest or BLM lands; still others ultimately will not be listed. Over 80% of the candidate species are plants, most of which have limited ranges on public lands. Landscape-level decisions made in the LRMPs may have no effect on such species. LRMP consultations may be

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[7] Similarly, the notice of intent to sue cited in the Petition at 30 presents radically different facts from this case. Over half of the species named in that letter were listed *before* adoption of and initial consultation on the LRMPs. In addition, plan-level consultation may not be required for several of the species because of their narrow ranges or the nature of the threats to their existence. For example, the Mount Graham red squirrel is found on a single mountain in the Coronado National Forest and is threatened primarily by construction of an astronomical observatory, not by forest plan activities. *Mount Graham Red Squirrel v. Espy*, 986 F.2d 1568 (9th Cir. 1993). Several other species are desert fish that are threatened primarily by irrigation development and stocking of non-native fish. *E.g.*, *Colorado Wildlife Fed'n v. Turner*, 23 Envtl. L. Rep. 20402 (D. Colo. 1992) (razorback sucker).

required only for mobile, wide-ranging species like the Snake River chinook, which evidence in the record shows are affected by the location, intensity, and design prescribed in the LRMP for numerous forest activities. *See infra* note 15.

For newly listed species affected by fewer forest activities than salmon, consultations on the plans or plan amendments may be accomplished quickly. Informal consultation resulting in short concurrence letters sufficed when the Umatilla and Wallowa-Whitman LRMPs were initially adopted, and the FWS consulted informally, rather than formally, on the PACFISH amendments. PRC Supp. ER 37(E), 37(F); 60 Fed Reg. 11655. As a result, the Forest Service may never again operate the forests for years without completing *any* plan-level consultation on the cumulative effects of forest activities on newly listed species.

Not only is this controversy unlikely to recur, but it need not have evaded review in this case nor must a similar dispute evade future review. This case did not become moot because of circumstances beyond the control of either party, such as a prisoner's release or a child reaching the age of majority. *Cf. Lane*, 455 U.S. at 624; *Honig*, 484 U.S. at 317. The Forest Service could have sought a stay from the court of appeals and this Court, enabling it to seek review before consulting on the LRMPs. *Cf. Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 656 n.6 (1974) (case not moot where petitioner obtained stay from Circuit Justice). This case has evaded review because the Forest Service failed to take adequate steps to preserve the status quo. The capable of repetition yet evading review exception does not apply.

Because this case became moot by virtue of petitioners' compliance with the ruling below, this Court should deny the petition rather than vacate the court of appeals' decision. This Court recently has explained that vacatur is ordinarily available only where the case has become moot by happenstance or the unilateral action of the prevailing party. *United States Bancorp Mortgage Co. v. Bonner Mall Partnership*, - U.S. -, 115 S.Ct. 386, 391-92 (1994). Where mootness results from an action within the petitioner's control, that party "has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari,

thereby surrendering his claim to the equitable remedy of vacatur." *Id.* at 392.

The Forest Service forfeited its right to review by complying fully with the court of appeals' decision. The agency cannot properly obtain vacatur by complying with the decision below and rendering the case moot, particularly where the case would not have warranted this Court's review had it remained a live controversy.

II. THE FIRST QUESTION PRESENTED DOES NOT WARRANT THIS COURT'S REVIEW.

The first question presented seeks review of whether the Forest Service had an obligation to reinitiate consultation on two LRMPs "*in addition*" to consulting on amendments to the plans and site-specific projects. That question is too narrow to provide useful guidance to the lower courts. Moreover, it contains assumptions at odds with the record actually before the court of appeals. The Forest Service admitted the inadequacy of the existing forest plans, and yet proceeded with projects without first completing consultation at any level. The court of appeals broke no new ground in deciding that the Forest Service must reconsult on the plans under such circumstances. That ruling is well-grounded in the ESA, the implementing regulations, expert agency practice, and judicial precedent, and can be satisfied with minimal disturbance to the management of the public lands. The Forest Service simply disagrees with the opinion below, even though it has been unable to convince a single judge to rule otherwise. Mootness aside, this issue is not worthy of this Court's review.

A. *The First Question Presented Is Too Narrow To Warrant Review.*

As framed in the petition, the point of contention is narrow. The issue is *not* whether the Forest Service should ever consult on forest plans. The Forest Service regularly consults on LRMPs when they are adopted, amended, or revised. Petition at I, 15-16. The agency itself stresses the importance of conducting plan-level or even ecosystem-wide consultations to ensure that its actions will not adversely affect endangered species. *Id.* at 22-23. And NMFS

concluded in both the PACFISH and LRMP biological opinions that plan-level consultations are necessary to assess the cumulative effects of land use activities on the listed salmon. PACFISH BO at 26; LRMP BO at 15.

The issue also is *not* whether the Forest Service has a duty to ensure that its ongoing activities are not likely to jeopardize newly listed species. The Forest Service concedes that ESA § 7(a)(2) imposes this responsibility and that the agency had to consult on ongoing activities in order to fulfill this obligation. Petition at 18 & n.12.

In addition, the issue is *not* whether revision of the forest plans was required in this case. The Forest Service admitted that its LRMPs required adjustment in order to protect the newly listed salmon and that consultation on the revisions would be necessary. Pet. App. 13a.

Finally, the issue presented in the petition is *not* whether reinitiation of consultation on the LRMPs would be necessary if the Forest Service had no intention to revise the plans. The only issue presented is whether the Forest Service had to consult on the existing forest plans "*in addition*" to consulting on promised future amendments to the plans. Petition at I.

No one disputes that the Forest Service must ensure, in consultation with NMFS, that its forest-wide activities are not likely to jeopardize the newly listed salmon. To the extent that the court of appeals' decision reiterated that consultation obligation, it is barely noteworthy. To the extent that the decision went further and directed the Forest Service to fulfill that obligation in a particular manner, the decision was unique to the particular facts of this case and was correct on those facts, as explained below. In either event, the decision does not merit this Court's review.

B. *Reinitiation Of Consultation On The LRMPs Was Not Duplicative, Meaningless, Or Unnecessary.*

The petition argues that review should be granted because the court of appeals imposed duplicative, meaningless, and unnecessary consultation requirements on the Forest Service. However, on the facts before the court of appeals and as they have evolved since, the LRMP consultation was necessary, meaningful,

and novel. No other programmatic consultations had occurred at the time the court of appeals ruled, and the subsequent plan amendments did not address the full effects of the LRMPs on the listed salmon. *See supra* pp. 6-7, 11-13. To the extent the court of appeals required consultation on existing LRMPs, it did so only in light of the history of consultation here and the particular needs of the salmon, not as a general requirement applicable to all species under all circumstances.

The Forest Service admitted to the court of appeals that its forest plans needed "adjustment" and that it must consult with NMFS on those revisions. Pet. App. 13a. Despite this acknowledgement, the Forest Service had not adopted, implemented, or consulted on *any* plan revisions at the time of the court of appeals decision, nor had the agency committed to any timetable for completing such revisions. *See supra* pp. 6-8. Furthermore, the agency was proceeding with dozens of timber, road, and grazing projects without completing even site-specific consultations. Pet. App. 6a n.6. Compounding matters, in the two project-level consultations that had been completed, NMFS concluded that projects the Forest Service had deemed "not likely to adversely affect" the salmon needed to be changed to ensure that they would, in fact, not harm the endangered fish. *See* PRC ER 107, 128; LRMP BO at 40.

The petition asks this Court to review whether the Forest Service is required to reinitiate consultations on LRMPs "in addition" to consultations on plan amendments and site-specific projects, but this question is at odds with the posture of the case as it appeared before the court of appeals. That court decided whether the Forest Service could continue managing the forests under the existing, inadequate LRMPs for an indefinite period of time without consulting with NMFS on the decisions made in the plans.

Also implicit in the first question presented is the assumption that consultation on the existing LRMPs would merely duplicate consultations on plan amendments and site-specific actions. However, the agency offered the court of appeals no assurances that either the site-specific consultations or the promised LRMP revisions would address all relevant standards, land allocations, and commodity output goals established in the forest plans. In

fact, as the PACFISH and LRMP biological opinions make clear, the site-specific and PACFISH consultations did not reach all such decisions that "may affect" the salmon. *See supra* pp. 11-13.

In the opinion of the expert fish and wildlife agency, consultation on the LRMPs was far from unnecessary, duplicative, or meaningless. *Id.* Ultimately, NMFS validated the court of appeals' decision by concluding that PACFISH addressed only some of the plans' adverse effects and that consultation on the LRMPs themselves was meaningful and necessary to evaluate the unamended aspects of the plans.

C. *The Decision Below Is Well-Grounded In The ESA, Its Regulations, Agency Practice, And The Case Law.*

The court of appeals decision is solidly grounded in the applicable statute, the implementing regulations, the practice of the responsible federal agencies, and the case law.

Section 7(a)(2) requires the federal agencies to insure, in consultation with the expert fish and wildlife agencies, that "any action" authorized or carried out by the agency is not likely to jeopardize a threatened or endangered species. 16 U.S.C. § 1536(a)(2). This Court has recognized the broad and mandatory sweep of this provision. *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 173 & n.18 (1978).

Under the joint consultation regulations, "[r]einitiation of formal consultation is required ... where discretionary Federal involvement or control over the action has been retained or is authorized by law and ... a new species is listed or critical habitat designated that may be affected by the identified action." 50 C.F.R. § 402.16.[8] A two-page letter from a regional director cannot trump this regulation. Petition at 9-10, 16-17, 20, 23 (discussing letter from NMFS regional director). The letter

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[8] NFRC argues that the joint regulations are not binding on the Forest Service. However, the court of appeals held that the Forest Service violated ESA § 7(a)(2), not the implementing regulations. Pet. App. 12a-13a. The court's decision was properly informed by the expert regulations. Pet. App. 10a.

mentions neither the regulation nor the FWS' previous application of the rule to forest plans, and has been superseded by subsequent, more informed events. As explained above, NMFS has repudiated the isolated view of this solitary official in the 40-page PACFISH Biological Opinion and 92-page LRMP Biological Opinion.

Under 50 C.F.R. § 402.16, reinitiation of consultation was required because the Forest Service retains the discretion to amend its LRMPs at any time. *See* 36 C.F.R. § 219.10(f)-(g). The LRMPs affect all forest management activities for ten to fifteen years and shape the impacts of those activities on newly listed species. The court of appeals properly held that the Forest Service must reinitiate consultation on the LRMPs to ensure, "in consultation with and with the assistance of the Secretary," that implementation of the plans is not likely to jeopardize the continued existence of the endangered Snake River chinook. 16 U.S.C. § 1536(a)(2).[9]

The ruling is also consistent with expert agency practice. In its biological opinion on the impacts of the Flathead LRMP, the FWS concluded, "[r]einitiation of formal consultation is required if ... a new species is listed or critical habitat designated that may be affected by the action." Flathead BO at 31. The court of appeals required nothing more than the agencies charged with implementing the Act believe is necessary.

Finally, the court of appeals acted consistent with its own precedents in holding that the Forest Service must reinitiate consultation on the LRMPs. The Ninth Circuit repeatedly has held that agencies must consult on their programmatic land management plans in order to protect listed species from the cumulative effects

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[9] In their brief discussion of 50 C.F.R. § 402.16, petitioners contend that the regulation does not apply to this case because the original consultations on the Umatilla and Wallowa-Whitman LRMPs were informal, not formal. Petition at 18 n.12. Under this interpretation, an agency would never have to reinitiate consultation on any action which was thought to have minor effects on a listed species, even if subsequent information showed that the action was likely to jeopardize that or a newly listed species. Such a result would be wholly inconsistent with the agency's ongoing duty under ESA § 7(a)(2) to avoid jeopardy from its actions to all endangered species.

of activities undertaken pursuant to the plans. *See Lane County Audubon Soc'y v. Jamison*, 958 F.2d 290, 294 (1992) (BLM must consult on multi-year timber sale management plan); *Resources Ltd. v. Robertson*, 8 F.3d 1394, 1399-1400 (1993) (Forest Service must consult on LRMP timber goals that may conflict with the preservation of threatened species). The decision that this obligation continues after initial approval of a plan follows from Ninth Circuit precedents and is consistent with the decisions of other circuits. *See Conner v. Burford*, 848 F.2d 1441, 1453 (9th Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989) (consultation on mineral leases must encompass not only issuance of the leases, but prospective post-leasing activities); *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991) (pursuant to ESA § 7, Forest Service ordered to prepare, in consultation with FWS, new timber management plan for national forests of Texas to respond to dramatic declines in threatened woodpecker caused by existing management direction).[10]

The court of appeals rendered a decision that is perfectly consistent with the plain language of the statute, the implementing regulations, prior agency practice, and previous judicial opinion. Because the court below did not depart from the accepted course of judicial proceedings, there is no need for this Court's review.

D. *Consulting On The Effects Of LRMPs On Newly Listed Species Will Not Unduly Disrupt Forest Management.*

The Forest Service complains that the ruling below has "substantially disrupted the management of federal lands and ... threaten[s] far-reaching consequences for the administration of

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[10] The petition cites *Sierra Club v. Robertson*, 28 F.3d 753 (1994), in which the Eighth Circuit arguably created a split with the Seventh and Ninth Circuits over whether environmental groups have standing to challenge LRMPs under NFMA and the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* *See Resources Ltd.*, 8 F.3d at 1394; *Idaho Conservation League*, 956 F.2d at 1516; *Sierra Club v. Marita*, 46 F.3d 606 (7th Cir. 1995). Standing was not an issue before the court of appeals in this case and is not a question presented by this petition.

more than 284 million acres of public lands in the Ninth Circuit." Petition at 3. These fears are vastly overblown.

Consulting on LRMPs that may adversely affect newly listed species need not disrupt forest management. As discussed above, *supra* pp. 14-16, it is far from clear that forest plan consultation will be required with great frequency upon the listing of new species. Most candidate species have no habitat on national forests, and few have wide-ranging habitat affected by the bulk of the activities in a forest.

Even where consultation is required, that process is, by statute, a short and flexible one. Consultations must normally be completed within 90 days. 16 U.S.C. § 1536(b)(1).[11] Since ESA citizen suits must be preceded by 60-days notice, the agencies have a statutory grace period to complete consultation before a lawsuit can even be commenced. 16 U.S.C. § 1540(g)(2).

In addition, the quick and flexible procedures of informal consultation will often be appropriate. The Umatilla and Wallowa-Whitman LRMPs initially received brief concurrence letters from the FWS, and the FWS also provided a brief concurrence on PACFISH. *See supra* pp. 15-16. More complex consultations will only be necessary for those few species that are widely distributed throughout a forest and are affected by a variety of decisions made in the forest plans.

Under the ESA, conferring with NMFS or the FWS also should begin before a final listing decision is made. 16 U.S.C. § 1536(a)(4) (conference on species proposed for listing). The result of that conference may be adopted as a final biological opinion once the species is listed. 50 C.F.R. § 402.10(d). Because there is no prohibition on action during the conference period, 16 U.S.C. § 1536(a)(4), the Forest Service has up to one year between the proposed and final listings to obtain a biological

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[11] Consultation on the LRMPs in this case took longer than 90 days because this was the first time that NMFS, an agency that normally deals with marine species and the ocean environment, consulted on forest plans. Moreover, the consultations addressed eight separate LRMPs, and the salmon are uniquely vulnerable to a broad range of activities governed by the forest plans.

opinion or concurrence on its LRMPs without disrupting any forest activities.[12]

Finally, as NMFS stressed, LRMP consultations will expedite subsequent project-level consultations. LRMP BO at 15, 65. Plan-level consultations will not waste agency time and resources, as petitioners complain, but will result in more efficient use of those resources down the road.

III. THE SECOND QUESTION PRESENTED WAS NOT DECIDED BY THE COURT OF APPEALS AND IS NOT RIPE FOR THIS COURT'S REVIEW.

The Forest Service contends that "the court of appeals misapplied established equitable principles by directing the district court to enjoin, pending completion of the consultation process, site-specific activities that the Forest Service has determined are not likely to adversely affect the newly listed species." Petition at I. The court of appeals gave no such direction, and the issue is still percolating through the lower courts.

A. *The Court Of Appeals Did Not Decide The Second Question Presented.*

Because the Forest Service had not reinitiated consultation on the LRMPs, the court of appeals focused exclusively on the scope of injunction pending the *commencement*, not the *completion*, of such consultations. Pet. App. 14a-17a. That issue certainly does not warrant this Court's attention since, as in this case, reinitiating consultation takes only a matter of days.

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[12] The disruption feared by the Forest Service stems not as much from the consultation process as from injunctions against forest activities during that process. Petition at 14, 24, 25, 29-30. This risk can be eliminated through compliance with 16 U.S.C. § 1536(a)(4). Moreover, because the court of appeals did not decide what activities must be enjoined during plan consultations, that issue is not properly before this Court. *See infra* pp. 24-28.

Whether projects must be enjoined during consultation was not decided until the remand from the decision at issue here. The court of appeals expressly left it to the district court to decide which activities should be enjoined if and when the Forest Service reinitiated consultation. *Id.* The court emphasized the limited scope of its holding in the final sentence of its opinion: "This shall not preclude the district court from considering further modifications to its injunction, in accordance with our opinion, if and when consultation is reinitiated." *Id.* at 17a. Indeed, the petition primarily focuses on the district court opinion on remand, not the appeals court decision subject to review here. Petition at 24-25. This Court should refuse petitioners' invitation to review a decision the court of appeals did not make.[13]

B. *The Scope Of Injunctive Relief During The Consultation Process Is Still Percolating Through the Lower Courts.*

The second question presented suggests that the court of appeals directed the district court to enjoin all "not likely to adversely affect" projects until the agencies completed consultation on the LRMPs. The court of appeals never issued such a direction, and the district court certainly never received it. The district courts in this and the related Idaho case did not mechanically enjoin NLAA activities, as suggested by the petition, but treated NLAA projects differently based on their independent interpretations of the ESA and the records before them.

On remand, the district court in this case accepted further briefing on the appropriate scope of injunctive relief during the consultation process. Contrary to its contentions in the petition, the Forest Service argued strenuously that the court of appeals' opinion did not compel any injunction once consultation was resumed, and that any statements to the contrary were "*dicta*" that

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[13] The court of appeals also never considered NFRC's theory that an injunction would harm the salmon by preventing the beneficial environmental effects of logging because NFRC never made this argument to the court of appeals. *See* Brief of Intervenors/Appellees (9th Cir. Feb. 16, 1994).

need not be followed by the district court. Defendants' Opposition to Motion for Permanent Injunction at 18 (D. Or. Sept. 9, 1994).

The district court issued an opinion enjoining all "may affect" tree felling and road construction, including NLAA projects. The court refused to enjoin NLAA grazing and removal of downed timber because, it concluded, those activities did not constitute an irreversible or irretrievable commitment of resources. Pet. App. 60a. The net result is that the district court enjoined a total of 16 timber sales for just over four months.

The district court did not rest its injunction solely on the court of appeals' decision. *Id.* at 51a, 54a-55a. According to the district judge, "even if I went past the Ninth Circuit's conclusion that *per se* irreversible timber harvests justify an injunction under § 7(d), I would nevertheless conclude that defendants fail to satisfy the second prong of the § 7(d) analysis...." *Id.* at 54a. Rather than view the court of appeals' decision as a straightjacket, the district judge exercised his equitable discretion to permit continued grazing and timber removal and to take an independent look at the issue of tree felling.[14]

Neither did the court of appeals' opinion prevent the Idaho district judge from exercising his equitable discretion. That judge invited motions to modify his injunction to exempt NLAA activities and temporarily stayed the injunction to give the Forest Service time to complete the LRMP consultation. *PRC Idaho*, 873 F. Supp. at 372; *id.*, Order (Jan. 25, 1995).

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[14] Petitioners complain that individual projects that the Forest Service has decided are "not likely to adversely affect" the endangered salmon should not be enjoined. Petition at 24-25. Petitioners fail to note that NMFS has not concurred in the vast majority of these NLAA determinations even though they admit that written concurrence is necessary to close the consultation loop. *Id.* at 6; 50 C.F.R. § 402.14(b). Moreover, NMFS disagreed with the Forest Service's NLAA determinations in the only two project-level consultations presented to the courts below. PRC ER 107, 128. The Forest Service has never presented to any court the issue of whether projects which *have* received NMFS' concurrence should be treated differently than the bulk of projects which never have received concurrence from NMFS.

In both instances, the district courts were guided as much by the records in front of them as by the court of appeals' decision. The Oregon district court expressly deferred to the Forest Service's determinations that its timber sales "may affect" the endangered salmon. The court concluded that it could not effectively "reclassify" these agency determinations as "no effect" designations by allowing the NLAA projects to proceed. Pet. App. 56a-57a. The Idaho district court, by contrast, indicated that it would allow activities to proceed under ESA § 7(d), but only after the Forest Service provided it with a record to support such determinations.[15]

PRC, the Forest Service, and NFRC have appealed from the Oregon district court's order on remand, and the Forest Service and intervenors have appealed the Idaho decision. Those appeals raise the same issue that the Forest Service seeks to present to this Court. This flurry of district court decisions and appeals underscores that this Court's review of the second question presented would be premature.

The court of appeals did not decide the proper scope of injunctive relief once consultation has been reinitiated and did not direct an injunction barring all NLAA projects. Since the court of appeals' decision, two district courts have exercised their equitable discretion based on the records before them and issued injunctions of varying scopes. The Ninth Circuit may have an opportunity to review the issue in the appeals of those orders or in the future. Until that happens, there is nothing for this Court to review. *Black v. Cutter Lab.*, 351 U.S. 292, 297 (1956) (Court "reviews judgments, not statements in opinions"); *Etsi Pipeline Project v.*

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[15] In addition, both courts possessed extensive expert testimony, submitted by PRC and never rebutted by defendants, that continued implementation of the LRMPs would jeopardize the endangered salmon and foreclose reasonable and prudent alternatives that could avoid this result. *E.g.*, PRC ER 48, 113, 116, 126 (declarations of Jonathan J. Rhodes and Dale McCullough). The Forest Service can claim that the courts below ordered injunctive relief "in the absence of any showing of likely harm to the species" only by ignoring this lengthy and uncontroverted testimony. Petition at 27.

Missouri, 484 U.S. 495, 516 n.11 (1988) (lower court statements "were pure dictum and there is no reason to address them here").

CONCLUSION

For these reasons, the petition should be denied.

Respectfully submitted,

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APPENDIX

50 C.F.R. § 402.16 provides:

Reinitiation of formal consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and:

(a) If the amount or extent of taking specified in the incidental take statement is exceeded;

(b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;

(c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or

(d) If a new species is listed or critical habitat designated that may be affected by the identified action.

No. 94-1332

APR 19 1995
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

JACK WARD THOMAS, CHIEF,
UNITED STATES FOREST SERVICE, ET AL.,
PETITIONERS

v.

PACIFIC RIVERS COUNCIL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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1. a. Respondents contend that review by this Court is unwarranted because the court of appeals' holding that the Forest Service must reconsult on the forest plans at issue was based on the peculiar facts of this case, and that the court articulated no broad, categorical rule. See, *e.g.*, Br. in Opp. 1, 14, 18-19. That contention is at odds with the court of appeals' decision.

The court of appeals' requirement that consultation be reinitiated on previously approved forest plans did not turn on any unusual characteristics of the particular plans at issue in this case. Nor did it turn, as respondents suggest (Br. in Opp. 19), on the peculiar needs of the newly listed salmon. Rather, the court first held, as a matter of law,

that previously approved forest plans, by their very nature, constitute "ongoing agency action" within the meaning of the Endangered Species Act (ESA). See Pet. App. 7a. The court then concluded—essentially without analysis—that Section 7(a)(2) of the Act required consultation on those plans. We believe that both those holdings are wrong. See Pet. 15-17, 19-21. In any event, however, the court's pronouncements that an existing plan is "action" and that plan-level consultation is required are categorical rulings, not limited (or even related) to any facts peculiar to the plans or species at issue.

Moreover, respondents' contention in this Court that the court of appeals' decision is fact-bound is inconsistent with respondent Pacific Rivers Council's claim in its essentially identical case (*PRC* v. *Thomas*, Civ. No. 94-0159-S-DAE (D. Idaho)) seeking broad injunctive relief against site-specific activities in Idaho based on the Forest Service's failure to reconsult on plans it previously adopted for six national forests in that State. During oral argument on December 6, 1994, on its partial summary judgment motion in that case, PRC stated (Tr. 6):

> [T]here is no longer any question that the Forest Service must comply with Section 7(a)(2) of the [ESA]. Forest plans are agency actions that may affect the salmon and require consultation * * * under Section 7(a)(2). This issue was laid to rest by the Ninth Circuit in Pacific Rivers Council v. Thomas.

The district court agreed and broadly enjoined site-specific activities until completion of consultation. See page 6, *infra*.

b. Nor is there any ground for respondents' contention (Br. in Opp. 19) that the court of appeals' decision is based on the "history of consultation" in this case. In holding that "consultation on the entirety of both LRMPs is

required, not just an amendment to the LRMPs" (Pet. App. 13a n.12), the court addressed neither the sufficiency of the consultation the Forest Service intends to undertake on any future plan amendments, nor the status or adequacy of consultations on any site-specific activities. Rather, the court's holding rested on its erroneous conclusions that (1) the mere continued existence of a forest plan is agency "action," and (2) jeopardy to a species can be prevented only by consultation on the plans themselves.

Respondents suggest (Br. in Opp. 19) that the court of appeals' ruling was necessary to prevent the Forest Service from "managing the forests * * * for an indefinite period of time without consulting with NMFS [the National Marine Fisheries Service] on the decisions made in the plans." Respondents' underlying premise (that forest plans dictate decisions about site-specific activities, see *id.* at 5) ignores that the Forest Service's management of forests takes place at both the plan level and the site-specific level. See Pet. 3-4. It is true that a site-specific project may not be carried out if it is prohibited by the forest plan. But it does not follow that all site-specific projects that are not affirmatively barred by the plan will be allowed to proceed. Where, as here, a land-management plan envisions ESA consultation prior to site-specific activities, the action agency reasonably may conclude that it has adequately ensured that the plan itself will not jeopardize the species. See Pet. 4, 16 n.10.

c. Respondents contend (Br. in Opp. 20-21) that reconsultation on the existing forest plans was required by 50 C.F.R. 402.16. As we have explained (Pet. 18 n.12), however, that regulation is inapplicable both because the plans at issue here were never the subject of formal consultation and because the continued existence of a plan is not, in any event, an "action" within the meaning of the

regulation. Moreover, as respondents appear to acknowledge (Br. in Opp. 21), the only discretionary authority the Forest Service retains over previously adopted plans is to amend them, which is what the Forest Service planned to do before the court of appeals rendered its decision.[1]

d. The court of appeals has imposed on federal agencies a rigid requirement that they engage in ESA consultation in a particular manner, and at a particular time. That holding has no basis in the ESA, which affords federal agencies substantial discretion to determine the appropriate time and manner of consultation. Respondents of course are correct that the factual circumstances of particular species or forests may vary. That point, however, reinforces rather than undermines the need for review by this Court. It is *because* circumstances vary widely that effective and efficient implementation of the ESA requires that the agencies concerned have substantial latitude to determine how the Act's no-jeopardy mandate can best be satisfied in a particular setting. The Ninth Circuit's rigid ruling will hinder the ability of action and consulting agencies to employ approaches to consultation that are tailored to the exigencies of the particular species, forest, and land-management plan involved. That ruling is of broad significance, because there are 284 million acres of federal land (covered by 186 planning documents) in the Ninth Circuit, and the con-

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[1] Citing a reference to 50 C.F.R. 402.16 in a biological opinion issued at the end of formal consultation on another forest plan, respondents assert (Br. in Opp. 21) that the ruling below is supported by "expert agency practice." In fact, NMFS, the expert agency responsible for anadromous fish, specifically concluded in this case that reinitiation of consultation was not required on the previously adopted forest plans when the salmon at issue here were listed, and both NMFS and the Fish and Wildlife Service take the position that such consultation is not legally required by the ESA.

sulting agencies have proposed for listing 58 additional species found in that circuit. See Pet. 14, 29.

2. Respondents offer essentially no defense of the award of injunctive relief by the courts below without any finding that the newly listed salmon would be harmed by any of the site-specific activities that were brought to a halt.[2] Respondents do contend (Br. in Opp. 25-27) that the court of appeals ultimately did not determine the proper scope of an injunction barring site-specific activities during the consultation process; they assert that it directed entry of an injunction barring site-specific actions only until consultation was *reinitiated*. The court of appeals made clear, however, that the injunction it ordered would not expire upon reinitiation of consultation, but would remain in effect unless and until it was modified by the district court. See Pet. App. 16a-17a. And the court of appeals directed the district court how to proceed in determining whether to modify the broad injunction once consultation was reinitiated (*id.* at 16a):

> [The district court] may find guidance in [*Lane County Audubon Soc'y* v. *Jamison*, 958 F.2d 290 (9th Cir. 1992)], where we held that the Bureau of Land Management could not go forward with any new sales of timber until consultation on a forest management plan and its effect on the threatened species was completed. Most importantly, we held that timber sales constitute *per se* irreversible and irretrievable

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[2] The only actions that the Forest Service allowed to go forward were those that it had found were *not* likely to adversely affect the species. Respondents did not challenge any of those determinations in their complaint, and neither court below set aside any of those determinations or independently found that the salmon would be harmed by any of the site-specific activities they enjoined. See Pet. 24-28.

commitments of resources under § 7(d) and thus could not go forward during the consultation period. *Lane County*, 958 F.2d at 295.

On remand, the district court concluded that "[u]nder the language of the Ninth Circuit's remand, timber sales may not go forward because they constitute per se irreversible and irretrievable commitments of resources which violate § 7(d)." Pet. App. 54a. The district court made clear that it regarded the court of appeals' discussion of timber sales as "part of the law of the case." *Ibid.* That likewise was respondents' interpretation of the Ninth Circuit's decision: In their motion for a permanent injunction on remand, respondents argued (at 3) that based on the Ninth Circuit's "direction" in the passage quoted above, the district court "can and must issue the injunction now requested by PRC." The federal district court in the Idaho litigation brought by respondent PRC likewise concluded that the Ninth Circuit's decision in this case required it to enjoin all ongoing site-specific activities, even those the Forest Service had found were not likely to adversely affect the listed salmon. See *PRC* v. *Thomas*, Civ. No. 94-0159-S-DAE (D. Idaho Mar. 8, 1995), slip op. 1-2 ("Based upon unambiguous Ninth Circuit precedent, this court found that the failure of the National Forest Service to timely complete formal consultation with the National Marine Fisheries Service compelled the order enjoining all ongoing as well as proposed construction, timber, grazing and mining activities.").

In a similar vein, respondents contend that questions concerning the appropriate scope of injunctive relief in this case are "still percolating through the lower courts" (Br. in Opp. 24), and that review by this Court would therefore be "premature" (*id.* at 27). As respondents point out (*ibid.*), appeals from the district court's order on

remand are currently pending in the Ninth Circuit. Respondents fail to note, however, that they have filed a motion to dismiss those appeals as moot (see Motion To Dismiss the Appeal and Cross-Appeals as Moot, Nos. 94-36056, 94-35201 & 95-35021 (9th Cir. filed Mar. 9, 1995)) and that they unsuccessfully opposed the government's request that the Ninth Circuit hold their motion to dismiss in abeyance pending this Court's ruling on our certiorari petition (see Response to Motions to Hold in Abeyance, Nos. 94-36056, 94-35201 & 95-35021 (9th Cir. filed Mar. 20, 1995)).[3] In short, while respondents argue that review by this Court should await further consideration by the Ninth Circuit of the proper scope of injunctive relief, they are simultaneously attempting to prevent any such consideration from taking place in that court.

3. The plan-level consultation required by the court of appeals has now been completed, and the injunction entered by the district court on remand has expired by its own terms. Respondents argue (Br. in Opp. 13-17) that the certiorari petition should be denied because the case is moot. We disagree. Contrary to respondents' contention, the issues presented here are "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911); *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 481 (1990); see Pet. 30 n.22. However, if the Court concludes otherwise, we believe that the proper disposition is to vacate the judgment of the court of appeals rather than to deny the petition.

a. Respondents contend that "the issues presented in the petition are so narrow and fact-specific that they are unlikely to recur," and that "[t]he case framed by petitioners is virtually certain *not* to recur." Br. in Opp.

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[3] The motions to hold in abeyance were granted on March 31, 1995.

14. As we explain above (see pages 1-5, *supra*), respondents' attempt to characterize the dispute in this case as narrow and fact-specific is without merit. The question whether federal land-management agencies must engage in plan-level consultation upon the new listing of a threatened or endangered species that inhabits land covered by an existing forest plan is certain to recur frequently, given the anticipated volume of new listings in the near future and the large number of previously adopted plans. See Pet. 29. And in light of the Ninth Circuit's ruling that such consultation is required, questions concerning the permissible range of site-specific activities during reconsultation, as well as the availability of injunctive relief in the absence of any showing of harm to the species, will also inevitably recur.

Respondents acknowledge that consultation under the ESA ordinarily takes place within a truncated time frame. See Br. in Opp. 23 ("Consultations must normally be completed within 90 days."). Respondents contend, however, that the issues presented need not have evaded review by this Court because the government "could have sought a stay from the court of appeals and this Court, enabling it to seek review before consulting on the LRMPs." *Id.* at 16. The fate of any motion in the court of appeals to stay the mandate was surely sealed when the government vigorously but unsuccessfully opposed respondents' request that the court of appeals bypass the usual rules and issue its mandate before the government's petition for rehearing was filed.[4] In any event, respon-

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[4] See Opposition of the Federal Appellees in 93-36162/Cross-Appellants in 94-35042 to Emergency Motion for Injunction Pending Issuance of the Mandate or, in the Alternative, for Immediate Issuance of the Mandate (9th Cir. filed July 26, 1994). The court of appeals issued its mandate on August 4, 1994.

dents cite no authority suggesting that a request for such a stay is a prerequisite to invocation of the "capable of repetition, yet evading review" exception to mootness doctrine. Nor would such a requirement be conducive to effective use of this Court's scarce resources. There is consequently no merit to respondents' assertion that this case has become moot by virtue of voluntary compliance with the lower court's order.

Finally, respondents suggest (see Br. in Opp. 14) that even if the issues presented here could be expected to arise in future litigation, they could not be expected to arise in future litigation between the same parties. "PRC is no longer aggrieved," they insist, "and forcing it to litigate a case on behalf of unknown future parties is inconsistent with the strictures of Article III." *Ibid.* In light of respondents' asserted interests in "monitoring and protecting public lands, waters and wildlife," Pet. App. 20a-21a, it would seem reasonably likely that respondents will continue to be affected by federal land-management practices, including the manner in which ESA consultation is conducted upon the listing of new species. Indeed, as we have pointed out (see pages 2, 6-7, *supra*), respondent PRC is currently involved in such litigation with respect to six national forests in Idaho.

b. For the foregoing reasons, we believe that this dispute is "capable of repetition, yet evading review," and that the case is therefore adjudicable by this Court despite the fact that consultation has been completed and the injunction against site-specific activities has expired. However, if this Court chooses to treat respondents' submission and representations in this Court as a sufficient basis for accepting the premise that the legal issues presented are not likely to recur in litigation involving respondents, the judgment of the court of appeals should be vacated. The Court's "ordinary practice in

disposing of a case that has become moot on appeal is to vacate the judgment with directions to dismiss." *Lewis*, 494 U.S. at 482. That disposition is inappropriate, we recognize, where "the party seeking relief from the judgment below caused the mootness by voluntary action." *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 115 S. Ct. 386, 391 (1994). Contrary to respondents' contention (Br. in Opp. 16-17), however, neither the government's compliance with the ruling of the court of appeals (in order to enable private parties who are dependent on the forests to resume site-specific activities) nor its inability to obtain a stay is properly regarded as a "voluntary forfeiture of review constitut[ing] a failure of equity," *Bancorp*, 115 S. Ct. at 392, so as to disentitle the government to the relief of vacatur.[5]

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted. In the alternative, the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded with directions to dismiss the complaint as moot.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

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[5] See *Honig* v. *Students of California School for Blind*, 471 U.S. 148, 149-150 (1985) (per curiam) (court of appeals judgment affirming entry of preliminary injunction vacated where petitioners had completely complied with injunction prior to this Court's ruling on petition for a writ of certiorari); *University of Texas* v. *Camenisch*, 451 U.S. 390, 393-394 (1981) (same).